The Central Law Journal.

ST. LOUIS, OCTOBER 15, 1886.

CURRENT EVENTS.

JURY TRIALS IN CIVIL CASES.—The ancient conservatism of the profession seems to be deserting it. Lawyers, no longer controlled by such cautious maxims as *Stare decisis*, *quieta ne movere*, and the like, have become as the Athenians of old, seekers for new things, and clamor for reforms, as well of the fundamental principles of the law, as of the most immaterial of its processes.

Among other time-honored institutions threatened by the hand of innovation is trial by jury, not, *as yet*, in criminal cases, but in those which involve merely property, money and *character*. It seems to be conceded by the reformers that the time has not yet come to withdraw, from him who is accused of felony, or even misdemeanor, such protection as has been supposed, for a thousand years, to be afforded by a jury of his peers. It is said, however, that the powerful and oppressive baron, and the greedy bishop, against whom, in old times, it served to protect the poor man's heritage, are now extinct, and that, so far as civil actions are concerned, trial by jury has outlived its usefulness.

We do not, of course, propose to argue this question at length, the space at our command is wholly inadequate, even if we desired to do so. We suggest, however, a few considerations which have recently occurred to us.

The arguments, against the present system, are chiefly drawn, *ab inconvenienti*, the most fallacious and inconclusive of all arguments. It is said, for example, that trial by jury is expensive. Suppose it is, but if, notwithstanding that fact, and considering all the circumstances, the history of the institution, and its present operation, it is to the interest of the people that it should be preserved, the expense should not be regarded, for if there is one thing, more than another, in all the affairs of men, which is worth the money it costs, it is the due, just and impartial administration of the law. It is further said that it prolongs litigation. Concede that for a moment, and yet the answer is sufficient that, within reasonable limits, time is essential to the administration of justice. The most expeditious courts are those of semi-barbarians. The Turkish Cadi, or the Chinese Mandarin, hears, decides, and executes judgment at a single sitting, very satisfactory, no doubt, to the prevailing party; but whether there is either law or justice in the ruling is altogether another matter. We withdraw our concession, however, and say, that the only court in Christendom which has ever made itself a reproach, and a hissing, and a by-word among the nations of the earth, because of the excessive and inexcusable delays of its decisions, and consequent and absolute denial of justice, was a court in which no jury was ever empannelled. It will be found that in our country very little of the delays of justice, in civil cases, can fairly be attributed to mistrials, or new trials, or otherwise, to the juries; it can be much more properly charged to the *laches* of masters, referees, and receivers, on the equity side of the courts, and to crowded dockets which, in the appellate courts of most of the States, have become the rule, and are no longer exceptional.

Trial by jury was, in the Middle Ages, a safeguard for the private suitor against his political superiors, we have no use for it in that respect, having no political superiors; whether we need, or will need, it as a protection against our financial superiors, in the shape of concrete capital, is a question we will not discuss. It is sufficient, perhaps, to say that, having it, we should not part with it, for if we do, we can never recall it, however urgent may be our need.

Upon the whole subject we think that any litigant who desires it, should have his case tried by a jury, and that those States in which that is the rule have gone quite as far in that direction as policy justifies.

THE PROGRESSIVE CAPACITY OF UNWRITTEN LAW.—This is the title and subject of a lecture, delivered on the first day of October, 1886, before the Law Class of the University of Pennsylvania, by Professor Geo. Tucker Bispham. The learned professor demon-

strates that, for some centuries past, the unwritten or judge-made law has kept even pace with the general progress of the country, and that whenever, in the development of the better and higher conditions of modern society, there appeared a need for a new legal principle, or a new remedy, the courts were always ready with the new principle, or a new application of an old one. Thus, by the action of the courts alone, was developed the whole system of equity jurisprudence and practice, and the great body of commercial law. He says: "In glancing, therefore, over the whole field of Substantive Law, I think that we can plainly see that in many portions of it, at all events, unwritten law has been found not only quite capable of progress without any statutory aid, but that its progress has been of a practical and adaptive kind, and has always been ready to conform to any changes which have taken place in the social relations or business affairs of men."

The inference from this line of reasoning would seem to be that the courts can well be trusted with the task of effecting all the reforms in the law, which have been so persistently sought by the advocates of a general code, or, as it has been styled, reducing the common law "to the form of a statute."

We do not propose to go fully into that subject but merely to express two or three ideas that have occurred to us in this connection. The "progressive capacity of the unwritten law" is the precise quality which most strongly tends to authorize an attempt to reduce the whole body of the law to the form of a code or statute. Is not the unwritten law *too* progressive? Does it not multiply distinctions to such an extent as to justify an effort to consolidate them? Adjugded cases in a thousand volumes of reports bear witness to the industry of judges in *making* the law, for in effect it is making, not interpreting. Would it not be better to boil down, consolidate and condense the law now so diffused, so shifting and variable, into a solid body of distinct, definite and unambiguous precepts adapted to every phase of human affairs, and applicable to any possible emergency or combination of circumstances that can arise in the infinite variety of our political, social, domestic and industrial relations? Would it not be better to have such a code, and to make it so distinct and definite that it would need no interpretation, that it would explain itself? This is the ideal code; what the actual code would be, even if exploited by the greatest legal and legislative talent of the nation, might well be altogether a different matter. It might need interpretation from the very beginning, and substantial amendments before it had been six months in operation. A really good code would doubtless be an improvement upon the existing *status*, but such a compilation is rather to be desired than expected. The first work of the courts would be to expound the code, and to that end the infinite mass of ante-code precedents would be brought into requisition, and the most probable result would be that the uncertainty of the law, so much deprecated, would be rather increased than diminished.

NOTES OF RECENT DECISIONS.

Is an Intention an Existing Fact?—Deceit—Fraud—False Representation.—In a recent English case,[1] there is a somewhat new development of the law of deceit, false representations and fraud. The facts were that a joint stock company, limited, being in want of money, issued circulars asking subscriptions for debenture bonds to the amount of £25,000. The circulars stated the object of the company to be to enlarge its facilities for doing business, and, by diminishing expenses to increase its profits, and stated in detail how these desirable objects could be accomplished. The result showed that the true object of raising the money was to prop a failing concern, and tide over an emergency. In a few months after the plaintiff had taken the bonds and paid the money, the company failed and paid a very scanty dividend. The suit was brought to charge the directors personally, because in their circular they had made misrepresentations, whereby plaintiff had been induced to become a subscriber. The case turned upon two questions, first, whether the objects for which the money was required by the company were "existing facts," within the meaning of the phrase

[1] Edgington v. Fitzmaurice, 55 L. J. Rep. Chan. 650.

when applied to the action of deceit. The second question was whether it was necessary that the statement should be the primary inducement to the plaintiff to part with his money, or whether it was enough that it should be one among many inducements. The court decided, without division of opinion, that the statement of the objects for which a loan was solicited, or, in other words, of the intention of the borrower, is a statement of an existing fact, Lord Justice Bowen adding: "The state of a man's mind is as much a fact, as the state of his digestion." The court also decides that it is enough that the misrepresenation complained of should be a contributory part of the inducement; it need not be the sole or main fact.

The *London Law Journal*, commenting on this case, remarks: "The weakness of the decision consists in the fact that it is a question of pure common law decided after argument by equity counsel only, and by the judgment in the main of equity judges." After some discussion, however, it concludes: "On the whole, common lawyers may fairly accept this latest extension of the action of deceit."

QUO WARRANTO—INFORMATION—BY WHOM AND UPON WHAT GROUNDS IT MUST BE FILED.—In a very recent case,[2] the Supreme Judicial Court of Massachusetts has discussed the functions and operation of the writ of Quo Warranto, or of the nature thereof, and refused to apply that remedy to the relief of a private person upon whose relation the information was filed.

The facts were that Kenney, finding the operations of the gas company in digging up the street and laying pipes, inconvenient to his business as a brewer, caused the information to be filed upon his relation by the Attorney General.

The court held, that the plaintiff had mistaken his remedy, that the law will not accord the benefit of this extraordinary writ unless it shall appear that the desired relief cannot be obtained through ordinary processes. On the general subject the court says:

"We have no doubt that the court has jurisdiction, in proper cases, to restrain acts like those now complained of, upon the information of the attorney general, either on behalf of the commonwealth, or at the relation of a private individual.[3] But in determining whether a proper case has been made out, all the circumstances are to be looked at. In England, in cases like the present, where the court has refused to interfere by way of injunction, special significance has been attached to the circumstance that the informations were not brought in behalf of the public, but merely at the relation of parties privately interested, who might themselves have instituted legal proceedings if any special damage had been inflicted upon them.[4] In the former case,[5] Lord Cranworth went so far as to say: 'I cannot but come to the conclusion that the attorney general and the public here are a mere fiction, and that the real parties concerned are only those that were parties to the first suit.' Page 313. This, however, is not a controlling consideration; and, if an information is brought, in cases where the principal interest involved is a private one, the introduction of a relator is proper, in order that he may be liable for costs.[6] But, while not doubting that cases might exist in which the interposition of the court would be properly sought to restrain the digging up of streets, we see no occasion for such interference here. In a very recent case it has been declared that 'the court will not interfere when the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. There must be a want of adequate, sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong.'"[7]

By Pub. St. c. 106, § 77, it is provided

[2] Kenney v. Consumers' Gas Co., and Attorney General v. Same, Sept. 11, 1886, 8 N. East. Rep. 138.

[3] Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; District Attorney v. Lynn & B. R. R., 16 Gray, 242.

[4] Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, M. & G. 304; Attorney General v. Cambridge Consumers' Gas Co., 4 Ch. App. 71. 81, 82, 84, 87.

[5] Attorney General v. Sheffield, etc., Co., *Supra.*

[6] Pub. St. c. 189, § 19; 1 Daniell, Ch. Pr. (4th Amer. Ed. 1416.

[7] Attorney General v. Metropolitan R. R., 125 Mass. 515, 516.

that "the mayor and aldermen or selectmen of a place in which pipes or conductors of such a corporation [i. e., gas-light companies] are sunk, may regulate, restrict, and control all acts and doings of such corporation which may in any manner affect the health, safety, convenience, or property of the inhabitants of such place." A convenient tribunal is thus provided with adequate authority to remedy all the grievances set forth in the information, which consist solely in the attempt to open and dig up Terrace street. There is no averment that any application has been made to the mayor and aldermen, and relief refused. The case thus falls directly within the principle of the decision in Attorney General v. Metropolitan R. R.[8] In a case which, like the present, is brought to sustain private interests, there is no occasion for the interference of this court, at least until it appears that a real and substantial injury exists or is threatened, and that the mayor and aldermen have refused relief upon due application to them.

The information also prays that proceedings in the nature of a *quo warranto* shall be taken by the court to restrain the defendant from further use of its corporate power, and from usurping public franchises to which it is not entitled. But if the attorney general seeks such a remedy, it should be by an information *ex officio*, and not by an information brought primarily for the protection of private interests." [9]

In dismissing the bill and sustaining the demurrer, the court makes a further observation worthy of notice, that although the defendant failed to insist in the argument upon these objections it did not, and could not, thereby waive them, because cases not proper for equitable interference are not usually entertained even though parties consent.[10]

LIABILITY OF A HUSBAND FOR HIS WIFE'S TORTS.—Unexpected consequences sometimes follow radical changes in the law, as in other matters. The "Woman's Law" legislation of England (Married Woman's Property Act of 1882) has produced a notable consequence which is illustrated in a recent decision,[11] that under that act, although by it the wife is made a *feme sole* so far as her property is concerned, the husband may nevertheless be held to his old-time liability for her misuse of her tongue, her pen, or finger nails.

It seems that there was in England an impression to the contrary. The statute said that the wife might sue or be sued alone upon contract or in tort, and that her husband "*need*" not be joined, and people naturally imagined that what need not be done must not be done. The court, however, in the case cited dispelled the illusion by deciding that "need" meant what it said, that the act under consideration, was not an act for the emancipation of husbands, who, so far as torts committed by their wives were concerned, were held strictly to their common law responsibility. One aggrieved by the tort of a wife has under the act in question this advantage, he may sue both, and upon recovering a judgment may have it satisfied out of the separate estate of the wife, under the statute, or of the husband, under the common law, or out of both, and may exhaust both if necessary to satisfy the judgment.

[8] See, also, Attorney General v. Bay State Brick Co., 115 Mass. 431, 438.

[9] Com. v. Union Ins. Co., 5 Mass. 230, 232; Rice v. National Bank, 126 Mass. 300.

[10] New England etc., Co., & Phillips 141, Mass., 536, 546; s. c., 6. N. E., Rep., 534; Dunham v: Presby, 120 Mass. 285, 289.

[11] Seroka and Wife v. Kattenberg and Wife, 55 Law Gr. Rep. Q. B. 375.

CHARITABLE USES.

In Mr. Tilden's will—extracts from which were given in a recent number of the CENTRAL LAW JOURNAL,[1] there are certain bequests to charitable uses. While we do not intend to discuss the validity of these particular bequests, we propose to briefly consider some of the principles applicable to charitable bequests in general.

That the validity of such bequests has been, and still is, a fruitful source of litigation, both in England and in this country, is evidenced by the large number of reported

[1] *Ante* p. 217.

cases; and, that the question is an important and interesting one, is proven by the full consideration which a majority of the cases have received from the courts.

Charitable Use Defined.—A charity is a "gift to any general public use."[2] The familiar definition of a charitable use given by Mr. Binney in the famous Girard case, is, "Whatever is given for the love of God or the love of our neighbor—in the Catholic and universal sense."

The Statute of Elizabeth.—In Virginia and Maryland, the case of Baptist Association v. Hart,[3] is relied on. This case was decided upon the theory that the English law of charitable uses had its origin in Stat. 43, Eliz. ch. 4. That theory has been held, in a well considered case, to be error.[4] In Connecticut, in 1845, the Supreme Court decided that no such reasons as those upon which the Baptist Association case was decided, "exist here where we have by our statute of 1702 virtually re-enacted the Statute of Elizabeth."[5] And, thirty years later,[6] the court declared that that State had never adopted the Statute of Elizabeth, "but it has a substitute of its own," viz., the same statute of 1702, which is the statute now in force there.[7] The Statute of Elizabeth is not in force in Maryland,[8] nor its principles recognized as part of the common law of that State.[9] It was repealed in Michigan in 1810. The Revised Statutes of 1847 abolished uses and trusts, with the exceptions specified therein. The same requisites are, there, as essential to the validity of trusts for charitable uses as any others.[10] It is not in force in Mississippi.[11] It was repealed in New York in 1788,[12] where "The statute abolishes all uses and trusts," and does "not include perpetual trusts for charity, or the benefit of classes or corporations;"[13] and the rule which applies to trusts in general, governs charitable trusts.[14] In North Carolina it was in force till superseded by the Revised Statutes.[15] It is not in force *per se* in Pennsylvania, but its conservative provisions in force "By common usage and constitutional recognition."[16] If ever in force in Virginia it was repealed by statute 1792.[17] But the general provisions of the statute are in force in Maine,[18] and declared to be a part of the common law of that State.[19] In principle and substance it is a part of the law of Massachusetts.[20] So in Vermont.[21] So in New Jersey.[22] It is declared in Ohio that the principles of the statute, as embodied in cases decided in other courts, have ever been regarded with favor.[23] In Missouri see Chambers v. St. Louis.[24]

Cy Pres Doctrine.—The *cy pres* doctrine has never been adopted in Alabama.[25] Nor in Connecticut.[26] It was repudiated in Georgia prior to Code of 1873.[27] Doctrine is not resorted to in Indiana.[28] Nor in Iowa.[29] Nor is it "To its full extent a judicial doctrine, and, so far as ultra-judicial," not re-

[2] Perin v. Carey, 24 How. (U. S.) 506; Drury v. Natick, 10 Allen, 169; Piper v. Moulton, 72 Me. 155; Jackson v. Phillips, 14 Allen, 539.

[3] 4 Wheat 1; See also Kain v. Gibboney, 101 U. S. 362.

[4] Russell v. Allen, 107 U. S. 82 citing; Vidal v. Girard, 2 How. 127; Perin v. Carey, 2 How. U. S. 465; Ould v. Washington Hospital, 95 U. S. 303.

[5] Amer. Bible Soc. v. Wetmore, 17 Conn. 189.

[6] Adye v. Smith, 44 Conn. 60.

[7] Rev. Stat. 1875, p. 352, § 2.

[8] Dashiell v. Atty. Gen. 5 Harr. & J. 392; Beatty v. Kurz, 2 Pet. 566; Ould v. Washington Hospital etc., 95 U. S. 303.

[9] State v. Warren, 28 Md. 353.

[10] Meth. Church of Newark v. Clark, 41 Mich. 741; Hathaway v. New Baltimore, 48 id. 254.

[11] Rev. Code 1871, §§ 2440, 2441, making gifts by will to such uses void.

[12] Bascom v. Albertson, 34 N. Y. 602.

[13] Holmes v. Mead, 52 N. Y. 339; Wetmore v. Parker, id. 450; Dutch Church v. Mott, 7 Paige Ch. 77.

[14] Beekman v. Bonsor, 23 N. Y. 298.

[15] State v. Gerard, 2 Ired. Eq. 210.

[16] Zimmerman v. Anders, 6 Watts & Ser. 218; Meth. Church v. Remington, 1 Watts 218; Bethlehem Borough v. Perseverance etc. Co., 81 Pa. St. 445.

[17] Gallego's Ex'ers. v. Atty. Gen'l. 3 Leigh. 450, relying upon Baptist Assoc; Seaburn v. Seaburn, 15 Gratt. 426; Wheeler v. Smith, 9 How. (U. S.) 55.

[18] Howard v. Amer. Peace Soc. 49 Me. 288; Tappan v. Deblois, 45 id. 122.

[19] Drew v. Wakefield, 54 id. 291; Preachers Aid. Soc. v. Rich, 45 id. 552.

[20] Old South Society v. Crocker, 119 Mass. 1; Fellows v. Minor, id. 541; Burbank v. Whitney, 24 Pick. 146; Going v. Emory, 16 id. 107; Sanderson v. White, 18 id. 328.

[21] McAllister v. McAllister, 46 Vt. 272; Burr v. Smith, 7 id. 241.

[22] DeCamp v. Dobbins, 29 N. J. Eq. 43; Hesketh v. Murphy, 35 id. 29; But see Norris v. Thompson's Ex'ers. 19 id. 307.

[23] Miller v. Teachont, 24 Ohio St. 533.

[24] 29 Mo. 543. See Perry on Trusts, 698 and 699 for other States.

[25] Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 id. 299.

[26] Adye v. Smith, 44 Conn. 60.

[27] Adams v. Bass. 18 Ga. 130; See Code 1882, §§ 1709, 2468.

[28] Grimes v. Harmon, 35 Ind. 198.

[29] LePage v. McNamara, 5 Clark 147.

cognized in Kentucky.[30] Not resorted to in New York.[31] It is repudiated in North Carolina.[32] Is not in force in Wisconsin.[33] Nor in Pennsylvania.[34] In Massachusetts, see Jackson v. Phillips.[35]

Jurisdiction of Courts of Equity.—The tendency of American decisions, is that courts of equity, independently of the Statute of Elizabeth, favor the doctrine of trusts for charitable uses, and have original and plenary jurisdiction over such trusts, and can maintain and enforce them by their own powers.[36]

In Maryland, a court of chancery cannot, independently of the State, sustain and enforce a bequest to charitable uses, which would, if not a charity, be void on general principles.[37]

In New York, courts of chancery possess only such powers as were exercised by the English court of chancery, irrespective of the Statute of Elizabeth and *cy pres* doctrine.[38] "Gifts to charitable uses are highly favored in law, and will be most liberally construed."[39]

Descriptive Words — Beneficiaries.—"The beneficiaries in public charities must necessarily be described in general terms."[40]

"Charity begins where uncertainty in the beneficiaries begins."[41]

"It is the number and indefiniteness of the object which is the essential element of a charity."[42]

"Uncertainty, in the sense of the law of charities, is its daily bread. The greatest of all solecisms, in law, morals or religion, is the supposition of a charity to individuals personally known and selected by the giver."[43]

"If the uncertainty of the persons to be relieved by a charitable fund could be available to destroy it, few charities could be sustained."[44]

Selection.—There should be a mode of selection. "Relief must be administered according to the discretion and judgment of those who are to select the necessitous objects for whose benefits the use is created."[45]

"The construction should be such as will preserve, rather than destroy, the gift."[46]

The court will not suffer the gift "To fail when it can be made certain," notwithstanding the uncertainty of the object to be benefitted, and although no particular person or persons are named who may demand the execution of the trust.[47]

If a "charity does not fix itself on a particular object, but is general and indefinite, and no plan or scheme is prescribed, and no discretion is given in the will to select the beneficiaries, it does not admit of judicial administration." In addition to a definite class, the "will itself should prescribe some mode of selection, or give some person a discretionary power to select."[48]

In Virginia such bequests cannot be sustained when the objects are uncertain or indefinite.[49]

Abuse of Trust.—It is no "valid objection to charity that from a possible abuse in its administration, an injury might result to the

[30] Curling's Admr's v. Curling's Heirs, 8 Dana. 38; Cromie v. Louisville Orphan House, 3 Bush. 371.

[31] Bascom v. Albertson, 34 N. Y. 590; Beekman v. Bonson, 23 N. Y. 298.

[32] Bridges v. Pleasants, 4 Ired. Eq. 26; McAuley v. Wilson, 1 Dev. Eq. 276.

[33] Heiss' Exe'rs. to Murphy, 40 Wis. 292; s. c. 3, Central Law Jour. 639.

[34] Meth. Church v. Remington, 1 Watts 218; Bright Purd. Dig. Charities 18; Pa. Ann. Dig., Charities 2.

[35] 14 Allen, 539.

[36] Board of Comm'rs. v. Rogers, 55 Ind. 297; Williams v. Pearson, 38 Ala. 299; Miller v. Atkinson, 63 N. C. 537; Ould v. Washington Hospital, 95 U. S. 303; Dutch Church v. Mott, 7 Paige Ch. 77; Dodge v. Williams, 46 Wis. 91; Sowers v. Cyrenius, 39 Ohio St. 29; Howard v. Amer. Peace Soc., 49 Me. 289; Tappan v. Deblois, 45 Me. 122.

[37] Buchanan J., in Dashiell v. Atty. Gen'l. 5 H. & J. 392; See Barnum v. Mayor etc., of Baltimore 62 Md. 275.

[38] Owen v. Missionary Soc. 14 N. Y. 380; Compare, Dutch Church v. Mott, 7 Paige Ch. 77.

[39] Coit v. Comstock, 51 Conn. 377; Button v. American Tract Soc. 23 Vt. 336; Burr v. Smith's Exe'rs. 7 id. 241.

[40] Park C. J. in Coit v. Comstock, 51 Conn. 377.

[41] Dodge v. Williams, 46 Wis. 98.

[42] Saltonstall v. Saunders, 11 Allen 456; cited in Newson v. Starke, 46 Ga. 93; Burr v. Smith, 7 Vt. 241; Simpson v. Welcome, 72 Me. 501.

[43] State v. Griffith, 2 Del. Ch. 392.

[44] Chambers v. St. Louis, 29 Mo. 589.

[45] Burr v.Smith,7 Vt.241; Beavan v. Filson, 8 Pa. St. 327.

[46] Goodale v. Mooney' 60 N. H. 528; Russell v. Allen, 107 U. S. 82; Bull v. Bull, 8 Conn. 51.

[47] McLain v. School Directors, 51 Pa. St. 199, citing several cases; Zeisweiss v. James, 63 id. 468, and cases cited; Perry on Trusts, § 732.

[48] Loomis, J. in Fairfield v. Lawson 50 Conn. 513, 514; relying upon Grimes' Exe'r. v. Harman, 35 Ind. 198; See Beardsley v. Selectmen etc., 53 Conn. 491; White v. Fisk, 22 id. 53; citing, Reformed Dutch Church v. Mott, 7 Paige Ch. 77; Inglis v. Sailor's Snug Harbor, 3 Pet. 99.

[49] Kain v. Gibboney, 101 U. S. 362; Wheeler v. Smith, 9 How. (U. S.) 55.

interest of the society in which it is located."[50]

If the power of selection be abused, the State, by virtue of its visitorial power, will remedy it.[51]

Time—Amount.—In New York, Georgia, Ohio and California, provision is made by statute, determining, relatively, the amount that may be devised or bequeathed to charity, where the testator leaves husband, wife, child or parent. The time, prior to death, within which the will or deed must be executed, etc., is also limited.[52]

Bequests held Valid.—"To the education and tuition of all the pauper and poor children" of a certain "beat" (or county) "whose parents are not able to support them."[53] "For the promotion of education and science among the Indian and African children and youth of the United States of America."[54] For a "home for aged, respectable, indigent women, who have been residents" of N.[55] For the "charitable assistence and benefit of indigent, unmarried protestant females," &c., residing in B.[56] To be "used discretionary by the acting selectmen" of B, for the "special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans" residing in B, "until all is expended."[57] "To and for the support, maintenance and education of the poor, white citizens of Kent county generally."[58] For the education of the "poor children belonging to said county."[59] "Poor of Madison county."[60] For the "use of the orphan poor and other destitute persons of said county."[61] For "poor widows" and "women whose husbands have left them unprovided for and without any just cause," of and over "the age of fifty years, and of irreproachable character," residing in certain limits.[62] For the "education of the colored children of the State of Indiana."[63] "To the education of ——— children of this town."[64] "To the support and management of such worthy, meritorious, charitable and educational and religious institutions" of a certain faith.[65] "Poor orphans of this county."[66] "Purely and solely for charitable purposes—for the greatest relief of human suffering, human wants and the good of the greatest number."[67] For the "benefit of needy single women and widows."[68] "To the "suffering poor of" A.[69] To "provide and sustain a home for respectable, destitute, aged, native-born American men and women."[70] "For charitable purposes, masses, &c."[71] To "assist, relief and benefit poor and necessitous persons."[72] To the City of St. Louis to "furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the West."[73] To the "poor orphans of the State of North Carolina," to be selected by the trustees.[74] To be divided by the trustees "among such Roman Catholic charities, institutions, schools, or churches," in N, as they deemed proper.[75] To be "applied at discretion to alleviating the wants and sufferings of the deserving poor of" M.[76] For the "advancement and benefit of the Christian religion," to be applied in discretion of the trustees.[77] For the "education of

[50] Chambers v. St. Louis, 29 Mo. 443.

[51] Dodge v. Williams, 46 Wis. 98, citing; Re Taylor Orphan Asylum, 36 Wis. 534; Perry on Trusts § 732.

[52] 3 Jarman on Wills (Rand. and Tal. notes) 741 and note; Stimson's Amer. Stat. Law, 349, § 2618, Pa.; Appeal of Carl 106, Pa. St. 635.

[53] Williams v. Pearson, 38 Ala. 299.

[54] Treat's Appeal, 30 Conn. 113.

[55] Coit v. Comstock, 51 Id. 377.

[56] Tappan's Appeal, 52 Conn. 412.

[57] Beardsley v. Selectmen of Bridgeport, 53 id. 489.

[58] State v. Griffith, 2 Del. Ch. 392.

[59] Newson v. Starke, 46 Ga. 88; See also, Jones v. Habersham, 107 U. S. 174.

[60] Heuser v. Harris, 42 Ill. 425.

[61] Comm'rs of LaGrange v. Rogers, 55 Ind. 297.

[62] DeBruler v. Ferguson, 54 Ind. 549.

[63] *Exparte* Lindley Exe'r., 32 id. 367.

[64] Richmond v. The State, 5 Id. 334.

[65] Quinn v. Shields, 62 Iowa, 129, citing numerous cases.

[66] Moore v. Moore. 4 Dana, 357.

[67] Everett v. Carr, 59 Me. 334.

[68] Swazey v. Am. Bible Soc. 57 id. 523.

[69] Howard v. Am. Peace Soc. 49 id. 288.

[70] Odell v. Odell, 10 Allen, 1.

[71] Schouler Petitioner, 134 Mass. 426.

[72] Suter v. Hilliard, 132 id. 412; See also, Fellows v. Minor, 119, id. 542; Rotch v. Emerson, 105 id. 431; Bartlett v. King, 12 id. 536; Saltonstall v. Sanders, 11 Allen, 446; Going v. Emery, 16 Pick. 107; Sohier Exe'r. v. Wardens etc., 12 Met. 250; Brown v. Kelsey, 2 Cush. 243; Well's Exe'r. v. Doane, 3 Gray, 201; Atty. Gen'l. v. Old South Society, 13 Allen, 474.

[73] Chambers v. St. Louis, 29 Mo. 543.

[74] Miller v. Atkinson, 63 N. C. 537.

[75] Power v. Cassidy, 79 N. Y. 602.

[76] Goodale v. Union Assoc. etc., 29 N. J. Eq. (2 Stew.) 32; Hesketh v. Murphy, 35 N. J. Eq. (8 Stew.) 23.

[77] Miller v. Teachont, 24 Ohio St. 525; Sowers v. Cyrenius, 39 id. 29; Urmey's Exe'rs. v. Wooden, 1 id. 160.

scholars of poor people" in a certain district.[78] For the "education of the freedmen of this nation.[79] Bequest of personal estate to certain institutions for the "education and tuition of worthy, indigent females."[80]

Bequests held Void.—"For any and all benevolent purposes" the trustees "may see fit."[81] For a "Catholic Reformatory for boys." To the "most deserving poor" of N.[82] For the "education of the freedmen."[83] To "such worthy persons and objects" as trustees should deem proper, for "such charitable purposes" as trustees should deem proper.[84] To the "orthodox, Protestant clergymen of" P, for the "education of colored children, both male and female, as they shall deem best."[85] To be distributed by the trustees to "persons, societies or institutions" in their discretion."[86] "Solely for benevolent purposes."[87] For the "establishment of a school," at M, for the "education of children."[88] To benevolent associations of a city for the "benefit of white and colored children."[89] To "benevolent, religious or charitable institutions," in trustees' discretion.[90] To "foreign missions and poor saints."[91] "For all Christians who acknowledge the divinity of Christ," &c.[92] To be distributed "among such incorporated societies, organized under the laws of the State of New York and Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable and educational uses," to be selected by the trustee.[93] For the "support of indigent, respectable" females and orphans.[94] To any "other person or persons who may be in distress."[95] For such purposes as the trustees "consider as promising most to benefit the town and trade of" A.[96] For needy and respectable widows. —To the Roman Catholic congregation to build a chapel in R.—Devise of land to permit members of the Roman Catholic church, or those professing the Roman Catholic religion to build a church upon.[97] "The Roman Catholic orphans of the diocese" of L.[98] In conclusion we append a list of references to articles, text-books and notes, which treat of the subject of charitable bequests.[99]

Bridgeport, Conn., JOSEPH A. JOYCE.

78 Clement v. Hyde, 50 Vt. 716.

79 McAllister v. McAllister, 46 Vt. 272; *Contra*, See Fairfield v. Lawson, 50 Conn. 501, cited post.

80 Dodge v. Williams, 46 Wis. 70; See Gould Admr. v. The Taylor Orphan Asylum, id. 106.

81 Adye v. Smith, 44 Conn. 60.

82 Hughes v. Daly, 49 id. 34.

83 Fairfield v. Lawson, 50 id. 501; *Contra*, See McAllister v. McAllister, 46 Vt. 272.

84 Bristol v. Bristol, 53 id. 242.

85 Grime's Exe'rs. v. Harmon, 35 Ind. 198; s. c. 9 Am. Rep. 690; The following cases were considered and relied on by the court; Downing v. Marshall, 23 N. Y. 366; McCord v. Ochiltree 8 Blackf. 15; Beekmann v. Bonsor, 23 N. Y. 298; White v. Fisk, 22 Conn. 31; Fontain v. Ravenal, 17 How. (U. S.) 368; LePage v. McNamara, 5 Iowa 124; Barker v. Wood, 9 Mass., 419; Gallego's Exe'r. v. Atty. Gen'l. 3 Leigh. 450; Green v. Dennis, 6 Conn. 293; Wheeler v. Smith, 9 How. (U. S.) 55 Tripp v. Frazier, 4 Harr. and J. 446: Wildermann v. City of Baltimore, 8 Md. 551; Morse v. Carpenter, 19 Vt. 613; Presbyterian Church v. White, Phila. Law Reg. 526; Dashiell v. Atty, Genl. 5 Harr. and J. 392; Morice v. Bishop of Durham, 9 Ves. 399, 10 id. 522.

86 Nichols v. Allen, 130 Mass. 211.

87 Chamberlain v. Stearns, 111 Mass. 267.

88 Atty. Genl. v. Soule, 28 Mich. 153.

89 Watson's Socity v. Johnson, 58 Md. 139; Needles v. Martin, 33 id. 609.

90 Norris v. Thompsom's Exe'rs. 19 N. J. Eq. 307.

91 Bridges v. Pleasants, 4 Ired. Eq. 26.

92 White Exe'r. v. Atty. Genl. 4 Ired. Eq. 19.

93 Pritchard v. Thompson, 95 N. Y. 76; Fontain v. Ravenel, 17 How. (U. S.)369.

94 Beekman v. Bonsor, 23 N. Y. 298.

95 Hill's Exe'rs. v. Bowman, 7 Leigh 657.

96 Wheeler v. Smith, 9 How. (U. S.) 55.

97 Gallego's Exe'rs. v. Atty. Genl. 3 Leigh 450.

98 Heiss v. Murphy, 40 Wis. 276; s. c. 3 Central Law Jour. 639; commented upon in Dodge v. Williams, 46 Wis. 100, other cases; State v. Prewett, 20 Mo. 165; Barnes v. Barnes, 3 Cranch. C. C. 269.

99 Words defined, "Orphan" Soohan v. Philadelphia, 33 Pa. St. 9; "Protestant" Hale v. Everett, 53 N. H. 9; s. c. 16 Am. Rep. 82; See also Beardsley v. Selectmen of Bridgeport, 53 Conn. 489; "American" v. "Democratic widows" Beardsley v. Selectmen etc. id; See generally on the subject of bequests to charity; 2 Williams on Exe'rs.(Perkins' Am.Notes) bottom p.p. 1055, 1057 and 1070 *et seq.*and notes: 1 Jarman on Wills(Rand and Tal. Notes) 379 and note 382 *et seq*; 2 Comyns Dig. (Rose)399 Charitable uses; 6 id.450 Uses,N.1 *et seq.*; 3, Wash.on Real Prop.,(4th ed.)515-521; 5 Fields Lawyers Briefs § 763;2 Story's Eq.Jur.,1136-1194; Bispham's Eq. 116-134; 2 Wait's Act and Def.142-150;Perry on Trusts, §§ 687-748 and note History of Charitable Bequests, 17 U. S. (4 Wheat) Appendix, note 1; Note to Hespeth v. Murphy, 35 N. J. Eq. (8 Stew.) 23-30; Note to Bridges v. Pleasants, 44 Am. Dec, 98; Note to Dashiell v. Atty. Gen'l. 9 Am. Dec., 577, where the subject is discussed under the following heads: Statute of Elizabeth Regarding uses, What are Charitable Uses, Charitable Uses in United States, Law of New York, Doctrine as Applied in United States, Certainty in the object, Statutory Provisions.

INSURANCE—FIRE INSURANCE — FRAUDULENT MISREPRESENTATIONS—ACTION TO RECOVER BACK MONEY — WAIVER OF TORT—ADMISSIONS — PARTNERSHIP —MEASURE OF DAMAGES.

WESTERN ASSURANCE CO. v. TOWLE.

Supreme Court of Wisconsin.

1. A party defrauded by false representations may waive the tort, and recover back as upon an implied contract the money so obtained from him.

2. In such an action an admission by one member of a partnership is evidence against the firm.

3. In such an action the measure of damages recoverable by the insurance company is the amount paid by it in excess of the actual loss, unless it appears to the satisfaction of the jury that the insured not only exaggerated the loss, but either directly or indirectly caused the fire by which the loss occurred.

TAYLOR, J., delivered the opinion of the court:

This action was brought by the insurance company to recover from the appellant and Swan about $1,000, which the company had paid to them upon a policy of fire insurance issued by said company to Towle and Swan, as partners, upon an alleged loss by fire, of property covered by said policy. The complaint charges that the payment of the $1,000 was procured by the defendants from the company by making false and fraudulent proofs of loss, and by false swearing on the part of the defendants, Towle and Swan, as to the extent of their losses, and that, relying upon such false statements and proofs of loss, and not knowing of their falsity at the time, they paid the said $1,000 to the defendants; that afterwards, upon ascertaining the falsity of their statements and proofs of loss, and that they did not in fact sustain the losses claimed by them, and that there was, in fact, but a very small portion of said $1,000 due to them for losses under said policy, they demanded of said defendants the $1,000 so paid to them, by reason of said false and untrue proofs of loss and fraudulent representations; that the defendants have neglected and refused to pay the same; and demands judgment for the said sum of $1,000, with interest from the 27th day of September, 1881, that being the date of the payment thereof to them by the company. The first complaint filed in the action was demurred to as not stating a cause of action, and thereupon the plaintiff filed an amended complaint, to which the defendant Towle answered, and Swan suffered a default. For the details of these complaints a reference must be had to the printed case.

After the summons was served, and before any complaint in the action was made or served upon the defendants, or either of them, the plaintiff procured to be made a sufficient affidavit for a writ of attachment against the property of the defendants, and upon such writ the property of defendant Towle was attached. Towle thereupon, and before the service of any complaint in the action, gave an undertaking, as authorized by § 2742 Rev. Stat., conditioned as therein required, and the property attached was released from said attachment.

When the action was called for trial, and a jury empanelled to try the cause, the defendant Towle moved to dismiss the amended complaint, and strike it from the files for the reason that the action was begun as upon a contract, and the amended complaint sounds in tort. This motion was overruled, and defendant excepted. The defendant then objected to the reception of any evidence under the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, this objection was also overruled and defendant excepted. After trial the plaintiff had a verdict in its favor for $1,205.36, upon which judgment was rendered against both defendants. Towle alone appeals from the judgment. The verdict was the amount paid by the company to the defendants on the 27th of September, 1881, with interest from that date of the verdict, and no more.

The appellant makes the following assignments of error, upon the argument in this court:

1. "That the court erred in refusing to dismiss and set aside the amended complaint.

2. "In admitting the evidence of Nelson as to Swan's admissions made to him after the fire.

3. "In instructing the jury in regard to such admissions.

4. "In submitting to the jury upon all the evidence admitted (including the proof of Swan's admission), whether the fire by which the stock of staves was burned was set by the defendants, or either of them.

5. "In instructing the jury 'that the plaintiff has offered some testimony tending to prove that the fire was caused by the act or procurement of the defendants, or one of them,' referring plainly to the proof of Swan's admission to Nelson.

6. "In refusing to grant a new trial.

7. "Other rulings and decisions set forth in the printed case."

Under the first assignment of error, it is urged by the learned counsel for the appellant, that the amended complaint should have been dismissed and set aside for two reasons: First, because the original complaint in the action, though held insufficient in not stating facts sufficient to constitute a cause of action, was clearly intended to state a cause of action upon an implied *assumpsit* or contract to return the money fraudulen ly obtained by the defendants from the plaintiff, and it is alleged that the amended complaint clearly states a cause of action in tort to recover damages for the injury sustained by the plaintiff, by reason of the false and fraudulent representations, made by the defendants, and which caused the plaintiff to pay them the sum of $1,000. This objection is based upon the rule laid down by this court in the

cases of Supervisors v. Decker, 34 Wis. 378; Lane v. Cameron, 38 Wis. 603, and many others which might be cited. We do not think this objection is well taken. The nature of the transaction set out in the original complaint is precisely the same as that set out in the amended one, and if the amended complaint sets out a cause of action which must be treated as an action in tort, then it is clear to our minds, that there was an intention to set out the same cause of action in the original complaint, and there was no ground, therefore, for setting aside the amended complaint, under the rule stated in the cases cited.

Second, it is urged that, because the plaintiff sued out an attachment in the case and made an affidavit under the statute, stating that the defendants were indebted to the company in the sum of $1,000 upon an implied contract, etc., we ought to construe the complaint first filed, as a complaint setting up facts, showing an indebtedness upon an implied contract, this consideration should have great weight in determining the real character of the complaint filed, when, upon the facts stated, there is any real doubt as to its character. Judged in the light of that fact, we think the counsel is right in holding that the plaintiff in the original complaint intended to allege facts which would show an implied contract on the part of the defendants to pay the company the money they had obtained from it by their false and fraudulent practices. And, testing the amended complaint in like manner, we think that should also be held to be a complaint to recover of the defendants for money had and received by them, which in law, and in equity and good conscience, they had no right to retain, and therefore, there there was an implied promise to re-pay it to the plaintiff upon demand. The allegations of fraud, false swearing and deceit practiced by the defendants, alleged in both complaints, are alleged, not as the cause of action, but for the purpose of showing that the defendants have in their possession a certain sum of money, which, in law, they ought to pay to the plaintiff on demand. After setting up these facts a demand is alleged, a refusal to pay and a demand for judgment for the amount of the money so unjustly withheld from them, and not to recover damages on account of the tortuous acts of the defendants.

We think the claim of the learned counsel for the appellant, that the amended complaint must be treated as an action to recover damages for the tortuous acts of the defendants, and not an action upon an implied contract on the part of the defendants to pay the money received by them from the plaintiff wrongfully, was decided against them by this court in the case of The Town of Fifield v. Sweeney, 62 Wis. 204. In that case, as one cause of action, the complaint alleged that the defendant furnished teams to work for the town at three dollars per day; that the teams worked in fact 232 days, and "that the defendant falsely and fraudulently represented, by false statements of account and bill rendered, that his teams had worked in the aggregate 265 days; that he knew such statements to be false, and that he made them for the purpose of deceiving the town officers; that said officers believed such false representations and by reason thereof paid the defendant for thirty-three days in excess of the time actually worked by his teams; that town orders were issued for said team work and paid by the town treasurer, before the error was discovered; and that the plaintiff has sustained damages herein in the sum of $99 and interest." There was also in the complaint in that action an allegation of a demand for the amount of the money fraudulently obtained from the town, and a refusal to pay before the action was commenced, as in the case at bar. This case is, in all its general features, the same as the one at bar, and it was held that "The whole complaint goes upon an implied *assumpsit* to re-pay the money so had and received, and interest thereon, and no other damage by reason of the fraud or mistake is claimed. The complaint as for money had and received is even better by reason of the statement of the facts by which the *assumpsit* is implied, and these facts do not change the action into tort."

This court has repeatedly held that the plaintiff may waive the tort and recover upon an implied contract, when money or property has been obtained by the defendant from the plaintiff by the tortuous acts of the defendant. Nordin v. Jones, 23 Wis. 600; Keyes v. Railway, 25 Wis. 691; Elliott v. Jackson, 3 Wis. 649-654-5; Grannis v. Hooper, 29 Wis. 65; Smith v. Schulenburg, 34 Wis. 41-50; Wells v. Express Co., 49 Wis. 224; Graham v. R. R. Co., 53 Wis. 473-481. What was said in the last case cited, is not, we think, in conflict with the decision in the case of the Town of Fifield v. Sweeney, *supra*. Each complaint must be judged of upon the exact facts stated in it, in order to determine whether it be an action in tort or on contract. And in determining that question, the evident intention of the party in stating his facts must have effect in determining the question when the facts alleged might sustain a cause of action either in tort or on contract. As was said in the Graham case: "The original complaint was in tort, and as the second amended complaint stated facts sufficient in themselves to constitute an action for tort, the court would presume that the pleader intended to go upon the tort as his ground of action, and not upon the implied *assumpsit*. To hold that the amended complaint was intended to be an action of tort, would be consistent with the original cause of action stated, and would be a permissible amendment. To hold otherwise would be inconsistent with the original, and not permissible." So, in the case at bar, the plaintiff having caused an attachment to issue in the action, we must presume that he intended that his complaint should state a cause of action on contract, in order to sustain his proceeding by attachment, and the facts alleged being sufficient to

allow him to recover on the implied *assumpsit*, the complaint should be construed as an action upon contract, and not to recover damages for the tort.

Construing the amended complaint as one to recover upon an implied contract to re-pay the money wrongfully received from the plaintiff, the second objection now made, but which was not made on the trial, viz.: that the complaint should have been dismissed for the reason that it does not state a cause of action which would authorize the issuing of an attachment, would not seem to be well taken, had it been taken at the circuit. If it were admitted that the complaint was a complaint to recover damages for a tort, whether a motion to set it aside because an attachment had been issued in the case, should be granted, or whether the only remedy of the defendant in such case, would be to set aside the attachment, is not a question to be determined in this action, as we hold that the complaint is not in tort, and because no motion to set it aside on that ground was made in the court below.

The determination of the second, third, fourth and fifth assignments of error, depends upon the admissibility of the admissions of Swan, one of the co-partners, and one of the defendants in the action, in regard to the cause of the fire, as evidence for the plaintiff in an action to recover back the moneys paid to the partnership upon the insurance policy. The record shows that the admissions were made shortly after the fire and before the dissolution of the partnership. The witness Nelson says: "I had some talk with Swan about setting the stock on fire, some time after the fire." "What did he say?" This was objected to by the defendant, the objection was overruled and exception taken. The witness answered: "It was sometime after the fire; I could not say how long; maybe a month. We were at the mill, or house. He told me he put that to fire, himself, or set that afire. I cannot say how he worded it."

The admission given in evidence was made whilst the appellant and Swan were still partners, and it related to a matter in which the partnership was interested, and it tended to establish the plaintiff's cause of action against them. The plaintiff was seeking by his action to recover from the defendants a sum of money received by them as partners from the plaintiff, and the question at issue between the plaintiff and the partners was, whether in law they ought to have received said sum of money, when it was paid to them by the plaintiff. We are clearly of the opinion that any statement, made by either of the partners, whilst they were still partners, tending to prove that they ought not to have demanded or received the money from the plaintiff, is admissible as evidence for the plaintiff, as against both of the defendant partners. The general rule is, that the admissions of one partner are admissible against both, in an action by both, or against both. The following cases would seem to be conclusive upon this point: 1 Phil. on Ev. 498, notes 139, 137; Bond v. Lathrop, 4 Conn. R. 338; Walden v. Sherburn, 15 Whar. R. 409; Corps v. Robinson, 2 Wash C. C. Rep. 390; Adams v. Brownson, 1 Tyl. 452; Williams v. Hodgson, 2 Har & Johns. 474-477; Chapin v. Coleman, 11 Pick 331; Wood v. Braddish, 1 Taunt. 104; Thwaits v. Richardson, Peak, 16; Henderson v. Wild, 2 Camp. 562; Boyce v. Watson, 3 J. J. Marsh, 498-500; Taylor's Law of Evidence, p. 626, § 743; Cram v. Redingfield, 12 Sim. 35; Whitcomb v. Whiting, 2 Doug. 652; Rupp v. Latham, 2 B. & A. 795; Nicholls v. Dowding, 1 Stark R. 81; Raidstorm v. Gandell, 15 M. & W. 304; Phillips v. Clagett, 11 M. & W. 84.

The fact that Swan had suffered a default in the action, and was apparently hostile to his co-partner Towle, at the time of the trial, can make no difference as to competency of his admission as evidence, although it would affect the weight of such admissions as evidence, especially if the admissions were made after commencement of the hostile feelings of Swan towards his co-partner. The evidence being admissible, there was no error in submitting such evidence to the jury as a part of the plaintiff's case.

As there was a general verdict only in the case, we cannot determine whether the jury found in favor of the plaintiff for the whole amount paid by the plaintiff upon the policy on the ground that the fire which caused the loss, was set, or caused to be set, by the defendants themselves, or by one of them, or upon the ground of fraudulent and false proofs of loss in overvaluing the property destroyed by the fire.

Had there been no proof which would have justified the jury in finding that the defendants, or one of them, set fire to the insured property, and so caused the loss, the verdict should have been, not for the whole amount of money paid by the company for the supposed loss, but for so much only as the amount paid exceeded the actual loss sustained by the insured. The action for money had and received is, in some sense, an equitable action, and the insurance company having voluntarily paid the money on an alleged loss, claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid.

The provisions in the policy in regard to fraudulent over-estimates of the loss, or false swearing as to the extent of the loss, working a forfeitnre of their right to recover anything upon the policy, does not affect the rights of the plaintiff in this action to recover back money paid on the policy, nor enlarge its rights beyond what they would have been had no such provision been found in the policy. False swearing and false valuation in proofs of loss, might have been a good defense to a recovery upon the policy, had the plaintiff refused to pay the loss, but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's

right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants and that such payment was procured by the false and fraudulent acts of the defendants.

This action for money had and received to the plaintiff's use is in no way founded upon the contract of insurance, but upon the fact that false and fraudulent representations, were made by the defendants in order to induce the plaintiff to pay the same. This was so expressly held in the Northwestern Life Ins. Co. v. Elliott, 10 Ins. L. J. 333. In that case, the policy upon which the money had been paid, was void and illegal under the laws of Oregon. Still the company had paid the loss on the false claim of the death of the party whose life was insured. It was afterwards ascertained that the person whose life was insured was not dead, and the company thereupon brought an action to recover the money paid. It was insisted on the trial that the claim for the money was founded on the void and illegal contract of insurance, and for that reason no recovery could be had. Judge Deady, in deciding the case, says: "True, the plaintiff might, at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to plaintiff's use and the law in the interest of justice, and by way of promoting the remedy which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect in affirmance of its validity but only an implication or fiction of law that upon the facts—the plaintiff being entitled *ex æquo et bono* to recover the money which the defendant had wrongfully obtained from it—he promised to repay the same." Cutts v. Phalen, 2 How. (U. S.) 376, holds the same doctrine.

The plaintiff, in the case at bar, in order to avail itself of the right to sue out an attachment in this action, elected to waive the action for the wrong committed by the defendants, and bring their action for money had and received to its use, upon the implied *assumpsit* to repay the same. In this action it recovers the money if it recovers at all, on the ground that it has paid for a loss which did not in fact occur. If the loss did not in fact occur, to the extent of the payment made, then in equity and good conscience the money ought not to be refunded, and no promise to refund the same could be presumed in favor of the plaintiff. And if there was a loss, though not as great as the money paid, and the excess of payment was made on account of the fraud of the defendants, as to such excess there would arise an implied promise on the part of the defendants to refund the excess. The fraud consists in falsely over-estimating the claim, and demanding and receiving the excess beyond the actual loss, and not in receiving the money which was justly due for a real loss sustained. We think, therefore, that in this action for money had and received, which has always been considered an action at law, which is maintainable upon equitable principles, can only avail the plaintiff for the purpose of recovering what it has paid in excess of the real loss, if any, which was sustained by the defendants unless the jury should find that the fire which destroyed the property was caused, either directly or indirectly, by the wrongful act of the defendants, or one of them. If the latter fact was made to appear, there would be no loss under the policy which the plaintiff ought to pay. If, on the other hand, there was in fact an honest loss, under the policy, and the plaintiff has paid more than such honest loss, by reason of the fraud of defendants, that fact does not entitle the plaintiff to recover back in this action the amount of money which is covered by the honest loss.

The only case we have found which would seem to question the soundness of the conclusions we have arrived at, upon the question of the amount the plaintiff ought to recover in this action, if there was an honest loss, is Ins. Co. v. Mathew, 102 Mass. 221. This was, however, an action of tort to recover money obtained by false representations upon an insurance of live stock. There were two points in the case. First, that there were false representations made at the time of procuring the policy which renders it void, and similar false representations made in making proofs of loss upon which the money was paid. The case was, however, disposed of in favor of the insured and against the company upon another point not involving the question as to the amount which the company ought to recover in case a recovery was had by it.

The complaint of the plaintiff admits that some of the property burned was covered by the policy and the proofs show the same fact, so that there was something due the defendants from the plaintiff upon the policy, after the fire took place, unless they wrongfully caused the fire, and in determining the amount the plaintiff ought to recover, the amount of such actual loss should have been considered if they were entitled to recover at all, on the ground of fraudulent representations as to the amount of the actual loss sustained.

The learned circuit judge instructed the jury that if they found from the evidence that the loss of defendants was small and materially less than the amount of the policies of insurance, and that the defendants knew that fact when they made their proofs of loss, and intentionally and knowingly stated the amount of the loss to be materially greater than they knew it to be for the purpose of unjustly procuring from the plaintiff more than the amount of the loss, and the plaintiff paid the loss relying upon such proofs and in ignorance of its falsity, then the jury should find a verdict for the plaintiff for the full sum paid by it with interest from the date of payment. This instruction was excepted to by the defendant, Towle. As stated above, this instruction was er-

roneous, and did not state the true rule for establishing the amount the plaintiff should recover in this action upon that branch of the case.

As there was only a general verdict in the case, we cannot determine that the verdict was not based upon the fact that there was a fraudulent over-valuation of the amount of the losses of the defendants. This erroneous charge may have induced the jury to render a verdict for the whole sum paid by the plaintiff, notwithstanding they found in favor of the defendant, Towle, on the charge that the fire was wrongfully set by the defendants, or one of them.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

NOTE.—So long as the conditions in an insurance policy are not in violation of law or contrary to public policy, they are binding upon the assured, and any breach thereof by him releases the insurer from liability, as a general rule, whether the loss results from such breach or not.[1] Any substantial violation will defeat a recovery.[2] And a policy forfeited by a breach of condition cannot be revived by any act of waiver or estoppel unless done upon knowledge of the facts. The policy becomes void.[3] The preliminary proof of loss is a condition precedent.[4] But false swearing, to defeat recovery on a policy, must be fraudulent.[5] But courts of equity do not interfere in insurance cases unless they present extraordinary features.[6] Wise jurists have said this jurisdiction should be sparingly exercised.[7]

Decisions in actions for money had and received, to recover insurance money paid to the assured are not numerous. The reversal of the relations of the litigating parties often works different results from those obtaining before the money has been paid. Perhaps the true rule should be as stated by Wigram, V. C.:

"The court can never lawfully impose merely arbitrary conditions upon a plaintiff only because he stands in that position upon the record, but commonly require him to give the defendant that which, by the law of the court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit."[8]

The rule of damages generally is stated by Wood:

"If, after the settlement, the insurer discovers that there was fraud, misrepresentation, or concealment, in the original contract, or circumstances transpire which would have justified its resisting the claim, but which it had no means of ascertaining at the time of payment, it may recover the amount paid the assured."[9]

A case in Michigan seems to sustain this rule against the Wisconsin case. That was *assumpsit* to recover back. The policy contained the conditions that all fraud or attempt at fraud in the preliminary proofs of loss should bar a recovery. The issues were setting fire and fraudulent over-valuation. The jury found for the company for the amount paid and interest. The court said: "If either charge were made out to the satisfaction of the jury, the right to recover under the general count cannot be questioned. The point is too clear for discussion. The theory that the plaintiffs in error either set the fire, or caused it to be set, may be discarded altogether without affecting the regularity of the result, because the failure to find one way or the other on the special questions could certainly have no greater effect than would be due to explicit replies, and if such answers had been found and reported, they would reach no further than to negative the theory as to the fraudulent burning, without in the least conflicting with the correctness of the other ground. If, then, the entire report made by the jury is considered, and the utmost effect is given to the replies to the special questions, the result is that the jury found for the company, that is, the commission of fraud after the fire, and not upon the other, and no incongruity is caused."[10]

In Missouri, the same general rule seems to obtain. An action was brought to recover back money paid upon a policy after loss, in ignorance of a subsequent insurance upon the same property which avoided the policy by the terms thereof. The court said: "There is no doubt, at this day, that money which has been paid under a mistake of facts which, had they been known, would have been a defense to bar a recovery, may be recovered back. Here there was an act on the part of the assured directly against the policy stipulation, which would have discharged the office from all liability to the assured under the policy, had it been known at the time of the adjustment of the loss. As to the point, then, whether money can be recovered back which has been paid under a policy rendered void by the act of the owner, which act was unknown to the underwriters at the time the money was paid, the law is with the plaintiff below."[11]

In another case, the decision of the lower court in favor of the plaintiff was set aside, on the ground that the judge instructed the jury that they might find for

1 Wood on Fire Ins. § 58, n. 2 and 3; See Hartford Ins. Co. v. Matthews, 102 Mass. 221; Ferris & Eaton v. N. Am. F. Ins. Co. 1 Hill, 71; Johnson v. Continental Ins. Co. 39 Mich. 33; New York Life Ins. Co. v. Statham, 93 U. S. 24; Dermott v. Jones, 2 Wall. 1; Jeffries v. Life Ins. Co. 22 Wall. 47; Redman v. Ins. Co. 47 Wis. 99; Duncan v. Ins. Co. 6 Wend, 495; Nicoll v. Ins. Co. 3 W. & M. 529; 2 Pars. on Cont. 429; Mut. B. & Ins. Co. v. Miller, 39 Ind. 475; 1 Phillips on Ins. 418, 464; May on Ins. 160, 161; 3 Kent. Com. 472; Burritt v. Ins. Co. 5 Hill, 193; Wood v. Ins. Co. 13 Conn. 533; Wood on F. Ins. 317, 318, 271; Cooper v. Ins. Co. 50 Pa. St. 299; Loehner v. Ins. Co. 17 Mo. 247.

2 Blumer v. Ins. Co. 45 Wis. 627; Ripley v. Ins. Co. 30 N. Y. 136; First Nat. Bank v. Ins. Co. 50 id. 45; Babbitt v. Ins. Co. 60 N. C. 70; Cont. Ins. Co. v. Kasey, 25 Gratt. 268; Alexander v. Ins. Co. 66 N. Y. 466; Watson v. Ins. Co. 73 N. Y. 310; See Ætna Ins. Co. v. France, 91 U. S. 510; Day v. Ins. Co. 1 McArthur, 41.

3 Security Ins. Co. v. Fay, 22 Mich. 467.

4 Ferris & Eaton v. N. A. Ins. Co. 1 Hill, 71; See Com. Ins. Co. v. Sennett, *et al*, 41 Penn. 161.

5 Dogge v. N. W. Nat Ins. Co. 49 Wis. 501; Parker v. Amazon Ins. Co. 34 Wis. 364; Ins. Co.'s v. Weides, 14 Wall. 375; Williams v. Phœnix F. Ins. Co. 61 Me. 67; Moore v. Prot. Ins. Co. 29 Me. 97; Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350; Marion v. Great Rep. Ins. Co. 35 Mo. 148; Wolf v. Goodhue F. Ins. Co. 43 Barb. 400

6 Willard's Eq. Jur. 169.

7 Story's Eq. Jur. 1301, *et seq;* Douglass v. Knickerbocker Life Ins. Co. 83 N. Y. 492, 504; 1 Pom. Eq. Jur. 452; 2 Parsons on Cont. 462.

8 Hanson v. Keating, 4 Hare, 1, 4; Lady Elibank v. Montolieu, 5 Ves. 797; Sturgis v. Champneys, 5 My. & C. 102; Neeson v. Clarkson, 4 Hare, 97, 101. But see Pom. Eq. Jur. Vol. 1, p. 422, n. 1; See also, id. 423; also, Finch v. Finch, 20 Oh. St. 501, 507; Baker v. Drake, 53 N. Y. 211—for the general rule of damages, whether the action be in tort or on contract.

9 Wood on Fire Ins. p. 780; § 468, citing Arnould Mar. Ins. 1003, citing Buller v. Harrison, Cowp. 665; See also, May on Ins. § 477, 575; Gerhauser v. N. B. & M. Ins. Co. 6 Nev. 15; Jeffries v. Life Ins. Co. 22 Wall. 47; 2 Phil. Ins. § 1816, 1817; Townsend v. Crowley, 8 C. B, (N. S.) 477.

10 Johnson v. Cont. Ins. Co. 39 Mich. 33.

11 Columbus Ins. Co. v. Walsh, 18 Mo. 229.

the plaintiff, without finding that the defendant knew the falsity of the statement which was the basis of the action, yet the court expressly held that the action to recover back, would lie, under the circumstahces.[12]

In an early English case, "the late husband of the defendant had effected a policy on his life in the Argus Assurance Company. He died in October, 1840, leaving the defendant his executrix, not having (by mistake), paid the quarterly premium on the policy, which became due on the 3d of September, preceding. In November, the ordinary of the office informed two of the directors that the policy had lapsed by reason of the non-payment of the premium, and one of them wrote upon the policy the word "lapsed." In February, 1841, the defendant, as executrix, applied at the office for, and received from the same, payments of the sum secured on the policy. The directors had forgotten that the policy had lapsed. The action was sustained.[13]

It appears that in all these cases stated at length above, the full amount was recovered.

FRANK C. HADDOCK,

Oshkosh. Wis.

[12] Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221.

[13] Kelly v. Solari, 9 Mees. & W. 54; See also, N. Y. Ins. Co. v. Statham, 93 U. S. 24; Dermott v. Jones, 2 Wall. 1; Pearson v. Lord, 6 Mass. 81; Stuart v. Sears, 119 id. 143; Welch v. Goodwin, 123 Id. 71; Mer. Ins. Co. v. Abbott, 131 id. 397.

RAILROAD COMPANIES — MORTGAGE — LIEN—CONTRACT—CONFLICT OF LAWS.

BARNEY & SMITH M'F'G. CO. v. HART, RECEIVER, ETC.*

Court of Appeals of Kentucky, September 16, 1886.

1. *Railroad Companies—Mortgage—Lien—Contract—Conflict of Laws.*—Where half of the purchase price of railroad cars had been paid, and notes given for the balance, and the cars removed from one State to another, and placed upon the road of the company under its contract with a party to construct and equip certain parts of the road at a fixed price, a contract (that on the failure of the purchaser to pay the deferred payments the company should have the right to resume possession of the property, and sell it for the payment of the debt, and, in event it failed to pay the purchaser, was still to be liable, and that no right or title to the cars should pass to the purchaser until the whole was paid) made by the builder of the cars with the agent of the railroad contractor is in the nature of a mortgage,and creates a lien upon the cars as between the parties; but the title to the cars passes to the agent of the contractor, and the lien of the builder is not good against innocent purchasers and creditors, unless the contract is filed for record according to the laws of the State where the cars are taken.

2. ———. *Record.*—The lien of the builder for the purchase price of cars made in another State, and brought into the State of Kentucky, is governed by the laws of Kentucky, and is good against creditors and innocent purchasers only when recorded as required by the law of that State.

*S. C., 1 Southwestern Reporter, 414.

Appeal from Fleming circuit court.

Lincoln & Stephens and *O'Hara & Bryan*, for appellant, Barney & Smith Manuf'g Co.; *Wm. J. Hendrick*, for appellee, Theodore Hart, Receiver, etc.

PRYOR, C. S., delivered the opinion of the court.

In the month of March, in the year 1877, appellant, the Barney & Smith Manufacturing Company, doing business in the state of Ohio, entered into the contract with one A. P. Berthoud to construct for him the two cars in controversy, being at the price of $2,400 payable in installments. The sum of $1,400 was paid when the contract was made, and Berthoud's note executed for the balance, which seems, or the greater part of it, never to have been paid. By the terms of the contract it was agreed that, on the failure of the purchaser (Berthoud) to pay the deferred installments, the company (now appellant) should have the right to resume possession of the property, and sell it for the payment of the debt; and, in the event it failed to pay, Berthoud was still liable to the appellant therefor. It was also stipulated that no right or title to the cars should pass from or vest in Berthoud until all the purchase money was paid, and on full payment, and not before, the title to the cars, and the absolute property and possession thereof, should vest in Berthoud, the party of the second part.

The cars were constructed for the purpose of being used on the Covington, Flemingsburg & Pound Gap Railroad, in the state of Kentucky; and when finished by the company were delivered to Berthoud, and by him brought to Kentucky, and placed upon and used on that railroad. A man by the name of Quintard had contracted with this Pound Gap Railroad Company to construct and equip several miles of the road, and in the settlement of the accounts of Quintard, the value of these cars were charged to him as a part of the equipment of said road, and credited to Berthoud.

A short time after the cars had been placed on the road, many of the laborers and contractors who had worked on this road in its construction, and who had not been paid by Quintard for their services, instituted actions against him and the railroad company in the Fleming circuit court, and obtained general attachments, that were levied on the property of the company and Quintard, including the cars in controversy; the road being then operated by Berthoud, who was, as the proof clearly indicates, the mere agent of Quintard, the original contractor. The actions against Quintard were consolidated, and proceeded to trial under the name of *Mason, Shannahan & Co.* v. *Covington, Flemingsburg & Pound Gap Railroad Company and Quintard.* A receiver was appointed, who afterwards resigned, and another substituted, and, by an agreement with each, Berthoud was permitted to operate the road, with the cars upon it, as if no suit had been instituted; Berthoud agreeing that on the first of

March, 1879, he would deliver up to the receiver the rolling stock, loose materials, personalty, and all the property now on the track of said railroad, and belonging to the same, without any further notice. Berthoud was in fact operating the road under the direction of the receiver from the time the court placed the road in his possession.

After the institution of the various actions in the Fleming circuit court, the appellant (manufacturing company) instituted an action in the United States circuit court for the district of Kentucky against Berthoud, to recover from him the possession of the cars, under its contract. The marshal, by a process from that court, seized the two cars, and, before removing them they were taken from him by the receiver. Appellant's action against Berthoud in the district court was still prosecuted, and, Berthoud failing to appear, a judgment by default was entered, and the marshal again seized the cars; and, when this was done, the receiver in the Fleming circuit court instituted his action as such against the marshal, and regained the possession. When the action in the Fleming circuit court by the receiver against the marshal was called, the appellant, (manufacturing company) by its petition, asked to be made a defendant in lieu of the marshal, which was done, and then, by motion had the case transferred to the United States circuit court, at Covington, for trial.

The receiver, by an order of the Fleming circuit court, was directed to prosecute the action, and when the case was transferred to the district court such party submitted to the jurisdiction of that court; and, the law and facts having been submitted to the judge, a judgment was rendered adjudging that the receiver was entitled to the cars, and gave costs against the appellant. In that action, transferred from the Fleming circuit court to the United States district court, the appellant filed an answer setting up title by reason of its judgment by default in that court against Berthoud; and, by an amended answer, set up title in its own right against Berthoud, and all others claiming to be the original and absolute owners of the property. On the entire pleadings an issue was raised, and the title of the appellant brought directly in question, and the judgment rendered as heretofore stated.

After that judgment the appellant, conceiving that its only effect was to restore the possession of the cars to the receiver of the Fleming circuit court, on the ground that he had been unlawfully deprived of them by the marshal, filed its petition in the consolidated attachment suits pending in the Fleming circuit court, and asked to have the cars sold, and the proceeds of sale applied to the payment of its unsatisfied debt. In this assertion of right the appellant is met—First, with the judgment rendered in the district court in bar of any further claim of title; and, secondly, that, under the contract between the appellant and Berthoud, the title as to creditors and purchasers passed from the appellant, because the contract, being in the nature of a mortgage, had never been recorded.

Whether the judicial determination of the United States circuit court was in favor of the receiver on the question of title, or merely restored to him the possession of the property, the state court having first obtained jurisdiction, we shall not stop to inquire, as, in our opinion, the title to the property passed to the purchaser, Berthoud, the lien retained by the contract on the part of the manufacturing company being in the nature of a chattel mortgage. The statute of this state provides that "no deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record." Section 10, c. 24, Gen. St.

In this case $1,400 of the purchase money was paid to to the appellant by Berthoud, his note executed for the remainder, and the cars delivered to and brought from the State of Ohio to the state of Kentucky by him, and placed upon the road of the company under the contract with Quintard to construct and equip certain parts of the road at a fixed price. That it was a sale of the cars to Berthoud is manifest, and the reservation of title in the vendor was simply to create a lien by the appellant as against any purchaser or creditor of the vendee. It was a lien for the purchase price, or a part of the purchase money, that could be enforced between the parties, but did not affect the right of creditors unless recorded, as provided by the statute. All the appellant could have done under the contract was to regain the possession, and sell the property to satisfy the unsatisfied claim. The vendee had agreed that the vendor should sell instead of the chancellor, and but for this provision of the contract a court of equity would have been called on to enforce the lien. Appellant has made its vendee the ostensible owner,—had received more than half the purchase money,—and when the cars had been transferred to an adjoining state, and placed upon the track of the railroad company, the appellant, with this evidence of the lien in its pocket only, is now insisting that no title ever passed to its vendee, or that it has a prior equity against the claims of creditors. To so hold would be to disregard the the plain provisions of the statute, enacted to prevent fraud, and protect the rights of creditors and purchasers; and, as said by this court in the case of Greer v. Church, 13 Bush, 430, the title in such cases will be treated as being where the nature of the transaction requirer it should be. The cases of Vaughn v. Hopson, 10 Bush, 337, and Greer v. Church, *ubi supra*, settle this question.

In the case of Heryford v. Davis, 102 U. S. 235, on error to the circuit court of the United States for the western district of Missouri, the manufacturer of cars agreed to loan to B., for hire,

certain cars, to be used on its road, and at the same time took notes from B. for the value of the cars, with certain bonds of the company as collateral security for the payment of the notes; the latter to have the privilege, at any time during the four months, (the period of hiring,) to purchase the cars, on the payment of the notes; and that, until such payment is made in full, B. shall have no right, title, claim, or interest in the cars, except as to their use for hire. In default of payment, A. was to sell the cars for so much as might be needed to pay the amount due on the notes, and the balance, if any, to be paid over to B.; and, when all the notes are paid, A. agreed to give B. good and sufficient bill of sale. The cars were delivered to B. without the contract having been recorded, and C., obtaining a judgment against B., levied on the cars. The supreme court held that the title to the cars passed to B., and that, to protect them from seizure and sale by C., the contracts should have been recorded as provided by the laws of Missouri.

A similar decision was also rendered by the supreme court in the case of Hervey v. R. I. Locomotive-works, on error to the circuit court for the southern district of Missouri, reported in 93 U. S. 664.

It is insisted that Berthoud was not indebted to any of the creditors of Quintard, or the railroad company, and, the title being in him, his property should not be subjected to pay another's debt. The question is not raised by Berthoud, and, during the entire litigation, he has made no claim to these cars, or interposed, by any pleading in the Fleming circuit court, to show title in himself, or that he had any interest in the litigation. His testimony might have shed some light on the subject, and, although anxious to prevent creditors from making their debts by the sale of the cars, he fails to testify as to title in himself, or to speak at all with reference to the claims of others. The suits had been pending in the state courts since March, 1877, by these creditors claiming that the cars belonged to Quintard or the railway company. He made no claim in his own right, but undertook to operate the road as the agent of the receiver. In February, 1878, long before the appellant sued Berthoud in the United States circuit court, as the agent of Quintard or for himself, he made out an account against the railroad company for these cars, that was allowed. All the rolling stock was charged to the company, or transferred to it, and not until February, 1879, was the claim of the appellant asserted against Berthoud. Quintard had agreed to construct and equip this road. The cars and rolling stock was upon it, being used for purposes of transportation. No claim was set up all this while by Berthoud. That he was the agent of Quintard, or connected with him in the contract, is evident, and equally as manifest that they charged the railway company with these cars long before any claim was set up by the appellant. So, whether the cars belonged to the railway company or to Quintard is immeterial. If to the railroad, it was an innocent purchaser; if to Quintard, his creditors can subject them. As to whether or not the cars were liable to the claims of attaching creditors, as against the lien of the appellant, must be determined by the law of this state. While the lien may be valid by the laws of Ohio against creditors and purchasers, it has no such effect in this state. Green v. Van Buskirk, 5 Wall. 310.

Judgment affirmed.

NOTE.—A sale may undoubtedly be made upon condition that the title shall not pass until the purchase money has been paid.[1] And an agreement of that character is valid, although the goods are not in existence when the contract is made.[2] And in cases of this character, the vendor is protected against attaching creditors.[3] The protection of the vendor, in such a case, is put, by Williams, C. J., in a Connecticut case,[4] upon the ground that when the vendee comes into possession of property known to belong to another man, it is incumbent upon persons disposed to deal with it, to ascertain its *status*. "Whether, therefore, the vendee had borrowed it, or bought it, or hired it, is a matter of inquiry, and ought to be ascertained by him who proposes to trust his property on the faith of this appearance."

The vendor, however, must, as against third persons, show that the vendee has not complied with the conditions of the sale.[5] Upon this condition the secret lien of the vendor is good against the creditors of the vendee. As to *bonâ fide* purchasers for a valuable consideration without notice, the principle is different. The rule is well established and without exception, that when it becomes necessary that one of two innocent parties shall suffer a loss, it must fall upon him who by his act rendered the loss possible.

There can be no doubt, that when personal property is transferred from one State to another, its liability to seizure and sale must be wholly determined by the laws of the State to which it has been carried.[6] It might well happen, therefore, that when the property has been so removed, the contract, which was in Ohio a conditional sale, might, in Kentucky, because of its registration laws, and their operation on secret liens, be held an absolute sale—but with a chattel mortgage attached, and therefore, without the prescribed registration, invalid against creditors or subsequent purchasers.—[ED. CENT. L. J.]

[1] Benjamin on Sales, 3d ed., p. 286, note; and cases there cited.

[2] Fenner v. Puffer, 114 Mass. 376.

[3] Strong v. Taylor, 2 Hill, 326; Hussey v. Thornton, 4 Mass. 405; Bennett v. Pritchard, 2 Pick. 512; Vincent v Cornell, 13 Pick. 294; Fairbanks v, Phelps, 22 Pick. 355; Hart v. Carpenter, 24 Conn. 427.

[4] Forbes v. Marsh, 15 Conn. 384.

[5] Leighton v. Stevens, 19 Me. 54; Leigh v. Mobile, etc., Co., 58 Ala. 165; Van Duzor v. Allen, 90 Ill. 499.

[6] Green v. Van Buskirk. 5 Wall. (72 U. S,) 310.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY.—*Agent's Authority— Warranty—Evidence—Sufficiency—Sale.*—The fact that the vendor of a steam-boiler, through his agent, furnishes the vendee, at the time of the sale, with his pamphlet descriptive of such boilers, in which durability is advertised as an essential quality, is evidence from which the agent's authority to warrant durability may be inferred. From evidence that, after the sale of a boiler by the vendor's agent, but before payment, the vendee claimed the agent warranted its durability, which claim the vendor neither admitted nor denied, but received the purchase price, it is competent to find such a warranty. *Smilie v. Hobbs*, S. C. N. H., July 30, 1886; 5 Atl. Rep., 711.

2. ASSIGNMENT.—*Partial Assignment of Debt may be Enforced in Equity—Not in Fraud of Insolvent Law.*—A bill in equity may be maintained to enforce the partial assignment of a debt. A. had made a contract to erect a school-house for the city of N., but became insolvent, and, in order to secure funds to enable him to complete his contract, made an assignment to C. of $600, which was a part of the sum to be due to him from the city of N. upon the completion of the school-house, and C. thereupon advanced him certain sums of money. *Held*, that the assignment was not in fraud of the insolvent law, and could be enforced in equity. *James v. City of Newton*, S. J. Ct. Mass., Sept. 8, 1886; 8 N. East. Rep., 122.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Goods Held to Secure Advances made by Insolvent—Right of Assignee—Death of one Partner—Power of Survivor to Execute Deed of Assignment—Improperly Uniting Actions—Recovery of Insolvent's Goods—Settlement and Distribution of Insolvent Estate.*—The assignee of an insolvent warehouseman properly has the possession of goods previously consigned to the warehouseman, to secure advances made to the consignor. Surviving partner has the power of executing a deed of assignment for the benefit of the firm's creditors. An action by an assignee to recover the possession of personal property cannot be united in an action to settle and distribute the estate of his assignor. *Atchison v. Jones*, Ct. of App. Ky., Sept. 11, 1886; 1 S. W. Rep., 406.

4. CONFLICT OF LAWS.—*Insolvency—Jurisdiction—Discharge in Another State.*—A defendant's discharge under the insolvency law of Massachusetts, is no bar to a suit in New Hampshire, on a contract made in that State before the insolvency, when the plaintiff has not resided there since the insolvency proceedings were begun, and has not submitted to the jurisdiction of the insolvency court. *Norris v. Atkinson*, S. C. N. H., July 30, 1886; 5 Atl. Rep., 710.

5. CONSTITUTIONAL LAW.—*State Quarantine Laws—Commercial Relations—Congressional Interference—Acts of Congress—Fee for Inspection—Preference of Port.*— The system of quarantine laws established by statutes of Louisiana is a rightful exercise of the police power for the protection of health which is not forbidden by the Constitution of the United States. While some of the rules of that system may amount to regulations of commerce with foreign nations or among the States, though not so designed, they belong to that class which the States may establish until Congress acts in the matter by covering the same ground or forbidding State laws. Congress, so far from doing either of these things, has, by the Act of 1799, c. 53, Revised Statutes, and previous laws, and by the recent Act of 1878, 20 U. S. Sts. 37, adopted the laws of the States on that subject, and forbidden all interference with their enforcement. The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, and the ports from which she came, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the Constitution concerning tonnage tax imposed by the States. Nor is it liable to constitutional objection as giving a preference for a port of one State over those of another. That section (nine) of the first article of the Constitution is a restraint upon powers of the general government and not of the States, and can have no application to the quarantine laws of Louisiana. *Morgan, etc. Co. v. Board of Health*, S. C. U. S., May 10, 1886; 22 Rep., 417.

6. CORPORATIONS.—*Action by Stockholders, when Entertained—Equity.*—A court of equity will not entertain an action by stockholders against the directors of the corporation and others, for the purpose of compelling the defendants to an accounting, obtaining the appointment of a receiver, and to restrain the collection of an assessment on the capital stock, on the ground of conspiracy, fraud and embezzlement by the defendants, if it appears that the plaintiffs, at the time they, in writing, requested the president and directors to institute the action on behalf of the stockholders (which request was refused), were aware that they had no cause of action against said directors, at least, and that the real object which they had in view in instituting the action was not stated to the directors; for in such case it is clear that the request to the directors; for in such case it is clear that the request to the directors to institute the action was not an earnest, but a simulated one. *Bacon v. Irvine*, S. C. Cal., July 27, 1886; 11 Pac. Rep., 646.

7. ———. *Execution of Instruments by—Authority of Officers—Mortgages—Foreclosure—Attorneys' Fees.*—Where instruments, purporting to be executed by a corporation, have affixed to them the corporate seal, and are proved to be signed by the proper officers, such officers must be presumed not to have exceeded their authority, and the burden to prove the contrary is on the party disputing the due execution of the instruments. Where facts and circumstances surrounding the execution of instruments by the officers of corporations show the existence of proper resolutions of authoriza-

tion, and support the presumption of their authoritative execution as shown by the corporate seal being thereto affixed, as well as the proved signatures of the proper officers, the fact that such resolutions do not happen to appear in the proper book of the corporation will not be held absolutely to disprove their existence, and make null and void such instruments. Where the resolutions of a corporation, authorizing loans and mortgages, did not give authority to have attorneys' fees secured in the latter, a court in actions for the foreclosure of the mortgages properly declines to allow any. *Schallard v. Eel River, etc. Co.*, S. C. Cal., July 13, 1886; 11 Pac. Rep., 590.

8. ———. *Franchises—Power to Extend Operations—Taxation—Exemption by Charter—Manufacturing Company.*—An act of the legislature giving a corporation power to extend its operations does not change its character or attributes, and therefore is not a new franchise. A corporation taxed, under the New Jersey law of 1884, for State purposes, is not liable for the payment of the same, upon showing exemption by its charter, and that it is a manufacturing company. *State v. Society, etc.*, N. J. Ct. Chancery, Sept. 24, 1886; 5 Atl. Rep., 724.

9. CORPORATIONS—*Municipal Corporations—Lien for Street Improvements—Complaint—Necessary Averments—Apportionment Between Lot Owners—Constitutional Law—Rules of Pleading—Legislature Assuming Judicial Functions.*—A petition seeking a lien for street improvements is defective which only alleges that the ordinance authorizing the improvements was duly passed by the general council. This is a mere legal conclusion, and all the facts entitling the contractor to his lien must be alleged and proven. A petition seeking a lien for street improvements must contain an allegation that the apportionment between the lot owners was made by the council as the law requires. The act of legislature of Kentucky of March 24, 1882, providing that all courts of Jefferson county shall take judicial notice of the passage, approval, contents, and publication of each ordinance of the city, *held* invalid, as making a petition to depend upon the legislative instead of the judicial judgment. *Johnson v. Ferrell*, Ct. App. Ky. Sept. 14, 1886; 1 S. W. Rep. 412.

10. ———. *Stockholders—Liability of.*—A statute provided that members of every incorporated manufacturing company should be liable for all debts of the corporation until the whole capital stock was paid in and certain certificates filed. *Held*, that this liability extended to all persons who were stockholders when the debt was contracted, and also to all persons who were stockholders when the liability was enforced by legal process, but not to persons becoming stockholders after the debt was contracted, and ceasing to be stockholders before the liability was enforced. Another statute gave to a stockholder paying such debt of the corporation an action for contribution against the stockholders "originally liable" with him for the debt. *Held*, that all persons who were stockholders when the debt was contracted, and also all persons who were stockholders when the liability for the debt was enforced, could be made to contribute. Executors and administrators may effectively plead the special statute of limitations of three years, in their favor, to an action against them for such contribution. Trustees holding stock in trust are liable to contribute from the trust funds in their hands. Married women are also liable to contribute, the liability being statutory and incident to the ownership of stock. No record is required to perfect the transfer of stock, unless such record is required by the charter or by-laws of the corporation. When outstanding notes of a corporation were paid by the proceeds of bonds issued by the corporation to others than the note holders. *Held*, that the debt represented by the bonds was contracted as and when the bonds were issued. *Sayles v. Bates*, S. C. R. I. July 10, 1886; 2 N. Eng. Rep. 633.

11. DEED—*Exception and Reservation From—Property Conveyed by Inference.*—As a deed of property carries with it that without which the property granted would be useless in the hands of the grantee, so, also, an exception or reservation in a deed works in favor of the grantor. *Green Bay, etc. Co. v. Hewitt*, S. C. Wis. Sept. 21, 1886; 29 N. W. Rep. 237.

12. EMINENT DOMAIN—*Action of Trespass—Jury of View—Waiver—Former Recovery—Timber Act of 1824.*—When one invested with the right of eminent domain enters upon and appropriates the land of another, without complying with an existing statutory requirement to make compensation or tender a bond, the land owner may recover in an action of trespass such damages for the unlawful entry and damages to the property as have been suffered to the time of bringing suit, or bond filed and approved in the event of such being done before suit brought. A land-owner whose land has been unlawfully entered upon by or under the right of eminent domain, may either proceed by action of trespass for the unlawful entry, or may waive his right to so proceed, and submit his entire case to the jury of view, but if he does the latter he is bound by it. A gas and water company, invested with the right to take property under a power of eminent domain, entered upon land without first making compensation or tendering a bond; after being in possession it cut timber; later a bond was filed by the company; later an action of trespass for the unlawful entry was commenced against the company. *Held*, that it was proper to show on the trial of such action that on the hearing before the viewers, the plaintiff has submitted the question of the value of the timber cut, and asked that the damages sustained therefor, be allowed, and that the jury of view had so allowed. When the cutting of timber is a mere incident to the taking of land for a public use the timber act of 1824 does not apply. *Bethlehem, etc. Co. v. Yoder*, S. C. Penn. March 29, 1886; 6 East. Rep. 838.

13. EQUITY—*Accident and Mistake—Reforming Deed—Trust.*—Where lands were intended to be conveyed to one in trust to another, but, by mistake, the intended trustee was given an absolute deed, and execution upon a judgment against him was issued, and the land in question was advertised to be sold to satisfy the execution, an action brought by the intended *cestui que trust* to reform the deed to the intended trustee so as to show the former's title will be sustained. *Sullivan v. Bruhling*, S. C. Wis. Sept. 21, 1886; 29 N. W. Rep. 211.

14. ———. *Cloud Upon Title to Realty—Sheriff's Deeds.*—A married woman is entitled, as a preventive against a cloud upon her title, to an injunction to restrain a sheriff from selling, under an execu-

tion in which her husband is the debtor, property which she, by clear and decisive proof, establishes to be her separate property, because she would be compelled to show, in an action of ejectment, by proof outside of the deed, that such property was her separate property, in order to defeat a recovery; for the true test by which to determine the question whether a sheriff's deed under an execution sale would cast a cloud upon the plaintiff's title is this: "Would the owner of the property in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence other than her deed, or her other muniment of title, to defeat a recovery?" *Tibbetts v Fore*, S. C. Cal. July 28, 1886; 11 Pac. Rep. 648.

15. ———. *Fraud—Undue Influence—Rescission of Contract.*—One whose consent to execute a contract has been obtained through fraud or undue influence may rescind the contract, but he must do it promptly on discovering the facts which entitle him to rescind. In this case, where a trust deed by a married woman was executed on May 23, 1884, and the plaintiff, having full knowledge of the facts, did not commence the action to set aside the deed on the ground of undue influence or fraud until October 10, 1885, and the complaint then failed to allege any reason for such delay, *held*, that the delay was unreasonable, and fatal to the action. *Burkle v. Levy*, S. C. Cal. July 28, 1886; 11 Pac. Rep. 643.

16. ———. *Jurisdiction—Chattel Mortgage—Agency—Partnership.*—A bill in equity will not lie where there is a remedy at law; hence, a general creditor cannot sue in equity to recover a debt for merchandise sold; where the chattels which the plaintiff seeks to have applied to the payment of his debt, are property which, from its nature, can be come at, to be attached, and taken on execution in a suit at law, if the property of the debtor and the debtor and the case stated are not within Pub. Stats. chap. 151, § 1, cl. 11. If the property was sold to defendant under a firm name, defendant's wife being the other member of the firm, plaintiff can sue him therefor, if, in buying, defendant acted as the agent of his wife, an undisclosed principal; and he can sue her also; but he can not sue both jointly, either at law or in equity; but may proceed against each separately, although not to judgment against both, for a judgment obtained against one, although unsatisfied, is a bar to an action against the other. If the chattels have been mortgaged or pledged to a third party, the general property is in the debtor and can be attached in an action at law; so, if the wife file a certificate proposing to do business on her separate account, under the firm name of her husband, filed in fraud of the statute and of his rights, the effect is that the property is attachable as his property, the deceit practiced being no greater than if any other person had taken the business, with defendant as agent. Section 3, chap. 151, Pub. Stats., gives jurisdiction in equity in the cases specified, concurrently with that of courts of law; and it is only on the ground that the debtor's property has been conveyed in fraud of creditors that plaintiff can bring his case within it. *Weil v. Raymond*, S. J. Ct. Mass. July 1, 1886; 2 N. Eng. Rep. 596.

17. ———. *Pleading — Presumption — Easement — Drainage.*—The discontinuance of an original bill does not dispose of a cross bill, where the cross bill sets up additional facts and prays for affirmative relief; in such case the cross bill remains for disposition as though filed as an original bill. A pleading, filed by respondent, seeking to enjoin the wrongful use by complainant of a drain, the obstruction of which the original bill sought to enjoin, does not set up new or distinct matter, and is maintainable as a cross bill. A right gained by prescription cannot be enlarged or extended beyond the prescriptive use. When the term "drainage" is used as appurtenant to lands, and, at the time, a drain for water exists, with no provision for house sewage, which, if included, might result in a nuisance, "drainage" will not be construed to include house drainage or sewage. *Wetmore v. Fiske*, S. C. R. I., July 17, 1886; 2 N. Eng. Rep., 626.

18. EVIDENCE. — *Parol Evidence — Ambiguity in Building Contract.*—Where a clause in the specifications, the basis of a building contract, recites that "the entire walls of the building, inside and outside, are to be painted," and it is claimed and denied that the meaning is that the plaster as well as the wood-work is to be painted, and an expert testifies that the meaning of the clause would "depend on the conversation," the language of the clause is sufficiently ambiguous to warrant the admission of extraneous evidence to explain its meaning. *Beason v. Kurz*, S. C. Wis., Sept. 21, 1886; 29 N. W. Rep., 230.

19. EXECUTORS AND ADMINISTRATORS.—*Debt Due Estate by Executor.*—The only property of a testator in the hands of her executor, as shown by the inventory filed in the county court by the executor, being a note given by the executor to the testatrix during her life-time, and certain rents due from him to her, the county court has no authority to compel the executor to pay a claim against the estate, as he had no funds in his hands belonging to the estate. The claim of the estate against the executor is a mere chose in action on which he may or may not be liable, and he does not admit that he owes the estate anything, or waive any defense he may have, by merely including the claim in his inventory. *In re Estate of Divan*, S. C. Wis., Sept. 21, 1886; 29 N. W. Rep., 213.

20. ——— ———. *Judgments — Liability of Heirs—Executor's Resignation — Presumption in Favor of Proceedings of Court.*—If there is a vacancy in the office of executor of the estate of a deceased person at the time an action is brought, and judgment is rendered therein against the estate, the heirs are not bound by such judgment. Where a probate court has jurisdiction of the subject-matter and the parties, all presumptions are in favor of the validity of its orders, and an order accepting the resignation of an executor cannot be collaterally attacked. *Luco v. Commercial Bank, etc.*, S. C. Cal., July 30, 1886; 11 Pac. Rep., 650.

21. FRAUD.—*Sale of Land—Misrepresenting Value.*—When property has been sold, and the deed thereof executed, and fifteen months afterwards a note is given to the vendor for the balance of the purchase money, the deed will not be set aside on the ground of misrepresentation as to the value of the property, when the representation is the mere judgment of the vendor, and the vendee has knowledge of, or means of ascertaining, the value of the property. *Belz v. Keller*, Ct. of App. Ky., Sept. 16, 1886; 1 S. W. Rep., 420.

22. ———. *Statute of Frauds—Contract.*—The statute of frauds of this State extends to contracts for

the sale of leasehold interests in land, as well as of lands and tenements, or making leases thereof. Hence an oral agreement to sell certain buildings erected upon leased land, and the machinery, together with the lease, which had about two years and nine months to run, is an entire contract, and and as such, including the leasehold interest, is within the statute of frauds, and an action thereon cannot be maintained unless the contract is in writing and signed by the party to be bound. Where defendants entered into the contract in good faith, and did not recede from it until they found that certain machines, which they supposed were included in the sale, belonged to the tenant in possession, and incurred expense in making alterations, an action on the case charging them with falsely entering into the contract with intent to injure the plaintiff, is not maintainable. *Potter v. Arnold*, S. C. R. I., July 17, 1886; 2 N. Eng. Rep., 621.

23. FRAUDULENT CONVEYANCES. — *Preferences — Partners— Trial — Submission of Issues — What Submitted.*—A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others. Lininger v. Raymond, 12 Neb. 19; S. C., 9 N. W. Rep. 550. A partner or firm has the same right, so long as the payments are made in good faith to creditors of the partnership. Where a cause is being tried by a jury, all questions of fact at issue, and material to the case, should be submitted to them, with proper instructions for their guidance. *Dietrich v. Hutchinson*, S. C. Neb., Sept. 8, 1886; 29 N. W. Rep., 247.

24. GARNISHMENT.—*Who Liable—Money Held for Third Party—Claimant not Appearing—Discharge of Trustee.*—A trustee in foreign attachment, who has received money from the debtor for a temporary purpose, with notice that it belonged to another party, is not chargeable for the money so received. In foreign attachment, the fact that the claimant of the funds in the possession of the trustee refused to appear under the terms imposed and leave granted by the court, does not prevent the discharge of the trustee. *Cram v. Shackleton*, S. C. N. H., July 30, 1886; 5 Atl. Rep., 715.

25. GIFTS INTER VIVOS.—*Revocation—Intention.*—After a valid gift *inter vivos* of a promissory note held by the donor, now deceased, against the donee, a re-delivery of the note to the donor, without any intention to re-vest the title to it in him, except in the contingency of his becoming poor, which never happened, is not a revocation of the gift, nor does it amount to a gift *inter vivos*. *Marston v. Marston*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 713.

26. HOMESTEAD.—*Mortgage by Married Woman — Equity—Jurisdiction.*—A mortgage of a tract of land, including the homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances; but *aliter* as to the portion of such tract, if any, not embraced within such exempt homestead. When a district court has gained jurisdiction of a cause for one purpose, it may and should retain it generally for relief. *Swift v. Dewey*, S. C. Neb , Sept. 15, 1886; 29 N. W. Rep., 254.

27. HUSBAND AND WIFE.—*Deed by Married Woman—Consideration.*—A deed of trust of her separate property executed by a married woman, empowering the trustee, in case of default on the part of her husband in making payment for certain indebtedness, to sell the property, and out of the proceeds to pay such indebtedness, is sufficiently supported by a good consideration where such deed is executed in consideration of the extension, by her husband's creditors, of the time to pay such indebtedness. *Burkle v Levy*, S. C. Cal., July 28, 1886; 11 Pac. Rep., 643.

28. INFANTS.—*Action—Goods Sold to Partnership —Plea of Infancy—Estoppel*—In an action upon contract for goods sold and delivered to a partnership, one member of which is a minor, the plea of infancy may be interposed by him in bar of any claim of personal liability upon the contract. An infant is not estopped from setting up such defense by the fact that he has engaged in business as a member of such partnership. *Folds v. Allardt*, S. C. Minn., Sept. 6, 1886; 29 N. W. Rep., 201.

29. INSURANCE.—*Benefit Associations.*—The certificate of a benefit association is in legal contemplation a policy of insurance and governed by the same general rules of law. Statements in the application must be incorporated or appropriately referred to in the contract to become warranties. Where the charter of a benevolent association provides that the benefit shall be paid to the party designated in the application, or if that be impossible, to certain other parties named, the rights of the beneficiary become vested when nominated in the application, and the name of such beneficiary cannot afterwards be changed by the member. Where there is nothing in the charter conflicting, however, the member may perhaps change the beneficiary, but a charter limitation will prevail over any general rule of law. *Presbyterian Assurance Fund v. Allen*, S. C., Ind., June, 1886: 15 Ins. L. J. 768.

30. ———. *Life—Payment of Premium.*—A., an insurance agent, residing at Chester, on May 1, 1882, received the application of B. for a $1,000 policy of insurance upon the life of B., the premium for the year being advanced by A. from his own funds; the application was forwarded to C. at Philadelphia [he being the agent of D., the insuring company], and was by him sent to D., whereupon a policy was made out, which with a receipt signed by the secretary, and containing the following: "Not to be valid or render said policy binding until payment is made as stated in the margin hereof during the life-time of the said insured, and this receipt countersigned by "C," agent, at Philadelphia, Pa.," was sent to C., who forwarded it to A. Neither the policy nor receipt was ever delivered to B.; but A., in making his settlement with C., treated the premium for the year as paid, and C., in his settlement with D., treated it as paid. On March 4, 1883, B. died; E., his administrator, brought *assumpsit* against D. to recover the amount of the policy. *Held*, that the payment of the premium by A. for B., if found as a fact by the jury, was such a payment as would be binding upon D. and would justify a recovery by E. *Continental, etc., Co., v. Ashcraft*, A. S. C. Penn., Apr. 5, 1886; 6 East Rep., 863.

31. MARRIED WOMAN—*Title to Real Property bought for her by Husband—Deed in Husband's*

Name—His Creditors.—Evidence—Res Gestæ—Declarations of Married Woman as to her Title to Land.—Where the husband buys land by his wife's direction for her, and makes the cash payment with her money, but gives his own notes for the deferred payments, which, however, are paid with her money, as they mature, though he has taken the title in his own name, without her knowledge, the land must be conveyed on her demand made upon the discovery that he had taken title. The declarations of a married woman made upon the discovery that her husband had taken title to land bought for her by him, by her direction, with her money, are competent evidence for her as *res gestæ*, in a suit by his creditors to set aside a conveyance to her of the land, as without consideration and fraudulent as against them. *Mitchell v. Colglazier*, S. C. Ind., May 24, 1886; 22, Rep., 427.

32. MASTER AND SERVANT—*Injury by Fellow-Servant—What Plaintiff Must Show.—Evidence—Expert—Whether Vessel Skillfully Handled.—Former Acts of Carelessness.—Declaration of Servant—When Admissible Against Master.—Fitness of Servant.—Negligence—Inference from Accident.*—Plaintiff, while engaged as a laborer in shoveling grain from cars into the hoppers of an elevator owned and operated by defendant, was ordered by the foreman, whose order he was required to obey, to assist in hauling in and fastening to the pier of the elevator a square-rigged vessel to be loaded from the elevator. The vessel had been brought to the pier by, and was in charge of, a steam tug commanded by an employee of the defendant; the captain of the tug neglected to have the yards of the vessel properly braced or stayed, so as to avoid contact with the elevator building while in the act of being placed alongside the pier, and in consequence the yards of the yards of the vessel came in contact with the building, and knocked off a parcel of slating, which fell upon and injured plaintiff. *Held*, that the captain of the tug and plaintiff were fellow-servants, and to justify a recovery, plaintiff must show (1) that the injury suffered by the plaintiff was caused by the negligent or unskillful management by the captain of the tug in attempting to place the vessel in tow in position along-side the pier; and (2) that there was want of ordinary care and diligence on the part of defendant in the employment, or in the retention in service, of the captain of the tug. The foreman of the elevator testified that he had frequent and constant opportunities of observing the way in which the tug brought vessels into the wharf at the elevator. He also testified that he had been engineer and assistant engineer in different steamers, plying to different parts of the country, and that he was familiar with the operation of tugs, having been about the harbor for twenty-three years. *Held*, that he was competent to testify as to whether the vessel was skillfully or negligently brought to the pier by the captain to be placed in position to be loaded. Proof of former acts of carelessness or unskillfulness on the part of the captain of the tug furnishes no presumption that he was guilty of negligence or unskillfulness on the occasion when the plaintiff was injured. The declaration of defendant's assistant superintendent, while engaged in the general management of defendant's affairs, and while observing the captain of the tug in the act of bringing in a vessel to the wharf, that "the longer he was in the employ the worse he got, or words to that effect," is admissible. Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual, rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent. A jury should not have been allowed to infer negligence from the simple fact of the happening of an accident. *Baltimore Elevator Company, v. Neal.* Md. Ct. App., June 23, 1886; 6 East, Rep., 497.

33. ——— ———.—*Negligence—Damages—Fact for the Jury.*—A railway company was engaged in the increasing of the width of a tunnel upon its line of road in order to accommodate two sets of tracks; A. was superintendent of the work, receiving his instructions from B., the railway company's road-master. Under directions emanating from B., A. erected at a point one hundred and sixty feet from one end of the tunnel and about forty feet from the railway tracks, a small frame building for the storage of dynamite, to be used in the accomplishing of the tunnel improvement; after the completion of the building and whilst it contained about one thousand one hundred and fifty pounds of dynamite, C., who was employed by the railway company as a flagman on a gravel train which was standing at a distance from the tunnel taking up ballast from the fragments that had been brought out, was directed by his conductor to go to the breast of the tunnel and flag a train that was about due then. Whilst performing that duty, the dynamite in the storage house, from some unknown cause, exploded, and C. was killed. *Held*, that the locating of the storage house, so far as C. was concerned, was not the act of a fellow-servant but of the railway company itself. *Held*, also, that the question whether the placing of the magazine was an act of negligence was for the jury. A master is bound to take heed, that he does not through his want of care expose his servants to unnecessary risks or dangers either from the character of the tools with which he supplies them or the place in which he requires them to operate. *Tissue v. Baltimore, etc., Co.*, S. C. Penn., March 29, 1886; 6 East Rep., 853.

34. MORTGAGE.—*Foreclosure—Sale of Platted Lots—Validity—Action to Set Aside Sale—Laches—Pleading.*—A. mortgaged lands to P., by government description, and thereafter caused the same to be surveyed and platted into lots and blocks, with streets and alleys. P. joined in the plat and dedication, and thereafter, upon default of the mortgagor, foreclosed and sold the land in separate blocks, as described on the plat. *Held*, that the sale was not necessarily void because the premises were not sold in smaller parcels, or in lots or half blocks. When an action to set aside a sale for such cause was delayed until after the time for redemption had expired, and the complaint failed to disclose any excuse for such delay, or to set forth the facts showing any special equities on the part of the plaintiffs, *held*, that a demurrer to the complaint was properly sustained. *Abbott v. Peck*, S. C. Minn., Sept. 7, 1886; 29, N. W. Rep., 194.

35. NEGLIGENCE.—*Instructions — Evidence — Contributory Negligence.*—Where prayers of the opposite party are excepted to only on the ground of want of evidence to support them, the objection that they are incorrect as legal propositions is deemed waived and will be considered on appeal. A special exception to the granting of prayers, on the ground of want of proof to support them, must show the defect in proof relied on. In an action to recover damages for personal injuries claimed to have been caused by the negligence of a railroad company, a prayer offered by defendant, which instructed the jury that they were entitled to consider the familiarity of plaintiff with the tracks and their use, should be refused. In admitting evidence of the knowledge of plaintiff and so allowing it to be weighed for all legitimate purposes, the court goes as far as it properly can. Where strict compliance with a city ordinance requiring the company to station a man on the front of locomotives or on the rear of tenders, "within twelve inches of the bed of the road," has been rendered impracticable through improvements in the construction of locomotives, failure to literally comply therewith is not of itself an act of negligence. Its spirit and intent must, however, be observed. It is contributory negligence in law for an adult, who is in full possession of all his faculties and familiar with the crossing and the movements of cars, to attempt to cross a railroad in front of a moving engine, in full view and within ten or twelve feet; and the jury should be so instructed, in case they find such facts to exist. *Baltimore etc., Co., v. Mali*, Md., Ct. of App. June 24, 1886; 3, Cent. Rep., 903.

36. NEGLIGENCE—*Question for Jury—Leaving Machinery Exposed—Contributory Negligence.*—The complaint charges negligence on defendant's part in leaving certain dangerous machinery exposed, in consequence of which plaintiff was injured. *Held*, upon the evidence in the case, that the jury were to judge whether it was reasonably prudent, under the circumstances, to leave such machinery exposed; and also, upon the question of plaintiff's contributory negligence, whether the plaintiff was apprised of the danger, or, in the exercise of ordinary prudence, ought to have known it; and that these questions were properly submitted to them. *Barbo v. Bassett*, S. C. Minn. Sept. 6, 1886; 29 N. W. Rep. 194.

37. PRACTICE—*New Trial—Newly-Discovered Evidence—Insurance.*—In an action on an insurance policy, which policy plaintiff alleges was issued on an application made and signed by himself, evidence on the trial that plaintiff did not know what representations the application contained, because it was made by his agent, are not properly admissible, because contrary to the averment of the complaint; but if such evidence is admitted, on judgment for the plaintiff, the defendant will be entitled to a new trial, on the ground of newly-discovered evidence, where, as a basis of his motion, he produces an affidavit of such agent, which puts in issue the plaintiff's statement that he did not know what representations were made, and tends to show that he himself made them. *Menk v. Commercial Ins. Co.* S. C. Cal. Sept. 1, 1886; 11 Pac. Rep. 654.

38. RAILROAD—*Municipal Corporation—Track in Street—Maintaining Proper Public Street—Numerous Tracks—Viaduct—Damages for Condemning Lands* — A railroad company which is authorized by its charter to lay its track or tracks on the street of a city, with the imposed duty of keeping the street in due repair, may be required to construct a viaduct to give proper public passage, if its tracks are so numerous and its use of them so frequent as to block public travel. The duty to keep the street in condition for free use is continuous, and the company must comply with any demand arising from any exigency. *Semble*, that in such a case, if land must be condemned to make the viaduct, the company, not the city, must pay the damages. *Minneapolis v. St. Paul, etc. R. Co.*, S. C. Minn. April 6, 1886; 22 Rep. 436.

39. SET-OFF AND COUNTER-CLAIM—*Judgment—Several Defendants.*—A judgment sustaining a counter-claim set up by one of several defendants inures to the benefit of the others; but, being so set up in one or two separate actions by the same plaintiff against the same defendant joined in the two actions, with different co-defendants, a judgment in the first action disposes of the counter-claim, and estops such defendant or his co-defendants to claim its benefit in the action following. *Bank of New London v. Ketchum*, S. C. Wis. Sept. 21, 1886; 29 N. W. Rep. 216.

40. TRUSTS—*Personal Property — Transfer Need not be in Writing—Express Trust—Subject—Purpose, and Beneficiary—Acceptance by Trustee—Revocation—Consent of Cestui Que Trust—Trial—Evidence—Striking Out—Motion Must be Definite.*—Where the subject of a trust is personal property, it is not necessary that the transfer should be in writing. The intention of a trustor to create a trust, where the subject is clearly defined and the purpose made manifest, and the acceptance of the trust by the trusteee, with full knowledge of its subject, purpose, and beneficiaries, creates the trust. After a trust is once created and accepted, it is not in the power of the trustor to revoke it without the consent of the beneficiaries, unless power to do so was reserved in the declaration of trust. When testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attacked that no uncertainty may remain as to testimony that is challenged. *Heilman v. Mc Williams*, S. C. Cal. Aug. 26, 1886; 11 Pac. Rep. 659.

41. WILL.—*Construction of.*—The testator gave an annuity of $200 to his sister, and directed $3,300 to be paid at her death to her children "and their representatives, if deceased, excepting" W. At the date of the will, eight of the sister's children were living, and two deceased, one of whom was the mother of W. and the plaintiff. *Held*, that it was clearly not the intention of the testator to exclude the issue of the two persons deceased; and that the plaintiff was entitled to share in the bequest as a primary legatee. *Bronson v. Phelps*, S. C. Vt.; 6 East. Rep., 779.

42. ——. *Construction—Lapsed Legacies—Descent and Distribution—Right of Devisee to Residue—Who Take—Gift to Heirs.*—By the terms of a will two persons were left specific shares of a residue. The legatees, however, died before the testator. *Held*, that those shares lapsed, and the testator died intestate as to them. M. J. W. was left a life-estate in a house and lot, "as his full portion

of the testator's estate." *Held*, not to exclude him from the participation which the laws of descent or the statute of distributions gives him in the two shares of the residue of which the testator died intestate. E. W.'s heirs were given a share of the residue. J. W., one of those heirs, died in the life-time of the testator, leaving children. *Held*, that J. W.'s children being persons who, at the death of the testator, would by law inherit a share of the real estate of E. W., and would be entitled to a share of her personal estate, they take under the gift. *Ward v. Dodd*, Ct. of Chan. of N. J., Sept. 10, 1886; 5 Atl. Rep., 650.

43. WILLS—*Revocation—Child or Children Born After Making Will.*—Every last will, made when testator had no issue living, wherein any issue he might have is not provided for or mentioned, if at the time of his death he leave a child or children, or issue, or leave his wife *enciente* of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate. *Coudert v. Coudert*, N, J. Ct. of Chan., Sept. 20, 1886; 5 Atl. Rep. 722.

44. WITNESS.—*Impeachment—Character and Reputation—Particular Knowledge of Individual Acts.*—Where the character of a witness is in question it is improper, on the cross-examination of an impeaching witness, to ask if the witness has any personal knowledge of any particular act of bad conduct on the part of the witness whose character is being assailed. Nor is such testimony competent on the re-direct examination. *Fox v. Commonwealth*, Ct. of App. Ky., Sept. 9, 1886; 1 S. W. Rep., 396.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

26. Plaintiff recovers a verdict and judgment before a jury and magistrate. The time for bond in appeal or stay of execution is ten days from rendition of judgment. The judgment can be made out of defendant's property but is not a lien until levy is made. On day of trial defendant and his counsel both request of plaintiff's attorney that execution be not issued; that they will either put in a bond in appeal or for stay of execution—either of which would have secured plaintiff's claim. Two days after trial defendant's attorney calls at the office of plaintiff's attorney, and not finding him in, leaves a note saying, "Don't issue execution, we will give either an appeal or stay bond." Plaintiff's attorney relies upon this promise. Before the ten days expire defendant's attorney learns that the defendant is insolvent and cannot give bond, and without notice to plaintiff's attorney writes for defendant two chattel mortgages—one in favor of another client of defendant's attorney, and the other in favor of a relative of defendant. They file these mortgages, the effect of which is to entirely defeat the plaintiff's claim. Can the action of defendant's attorney be justified? What was his duty in the premises? What would be a proper punishment for said attorney?

Cincinnati, O. J. T. H.

QUERIES ANSWERED.

Query 22. [23 Cent. L. J. 287.]—M. is indebted to one of the ice-dealers of Longstown, Ohio, on a bill contracted three years ago; he is irresponsible and unable to pay, being the head and support of a family and entitled to certain exemptions. For the purpose of compelling him and other delinquents to pay old bills, all of the ice dealers of said place entered into a written agreement in the spring of this year, to boycott all persons indebted to any one of them. In pursuance of said agreement, M. was notified that if he did not pay by a certain day that he would be placed upon the "black list," and the ice market closed against him. Being unable to pay he did not comply, and all ice dealers refused to sell him, though tendered the cash for the ice upon delivery. He then made arrangements with a neighbor to buy more than he wanted, and in that way obtained ice for a short time, and until the dealers found that out, when they refused to sell any more to the neighbor. So that, in fact, he has been absolutely unable to obtain ice during the season. Has he a cause of action at common law?

K. & H.

Answer.—There is no cause of action at common law. It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. Cooley on Torts, p. 278. Further, an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. Kimball v. Harman, 34 Md. 507. Chapman, C. J., in Carew v. Rutherford, 106 Mass., 12, says: "And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for, or deal with, certain men or classes of men, or work under certain conditions." There are no cases in conflict with the foregoing: but note this sentence from Lord Coleridge, C. J. in Mogul Steamship Company v. McGregor, a recent English case (vide Vol. 22, Cent. L. J. p. 305,) "a conspiracy to do the thing which has been called by the name of boycotting is unlawful and an indictment would lie; and if an indictment, then an action."

Cincinnati, Sept. 25, 1886. W. L.

RECENT PUBLICATIONS.

NEW TRIALS AND APPEALS, or the rules of practice applicable to the review of judicial determinations in civil actions and in special proceedings under the Code of Civil Procedure, with an appendix of forms. By Edwin Baylies, Counsellor at Law. Rochester, N. Y.: Williamson & Higbie, Law Publishers. 1886.

This is a work of a strictly local character, applicable altogether to practice in the courts of New York. It is well arranged and prepared with great care and labor, and will no doubt prove a valuable acquisition to the legal literature of the Empire State.

JETSAM AND FLOTSAM.

THE Congregation of the Inquisition at Rome has just issued a decree that has created a great sensation in Belgium, forbidding Catholic judges to grant divorces to Catholic suitors. There has been a divorce law in force in Belgium since 1803, and it has been administered under six different Popes without interference. Moreover, Leo XIII. passed three years at Brussels as Papal Nuncio, and witnessed its operation. His allowing the issue of this decree by the Inquisition is, therefore, looked on now as signifying in some degree the triumph of the Jesuit reactionists at the Vatican, and it promises a renewal of the bitter war between the Liberals and the clergy in Belgium. It probably means that the declining health of the Pope creates increased difficulty in resisting what our presidents know so much about—"pressure." The pressure of the reactionists is constant, while the power of resistance varies greatly in different men and at different periods of life. The persons whom the decree will most perplex, however, are the Catholic judges. They have sworn already to administer the law, and have been administering it without scruple or hindrance from ecclesiastical authorities. They must administer it still or resign. It will be interesting to see how many will do so; that is, how many will risk eternal damnation in order to keep their places. It seems rather hard on them, too, to be singled out for restrictions which are not imposed on their French, or English, or American brethren. The English or American judges could escape by leaving divorce cases to the Protestant brethren, but in Belgium the judges are all Catholic, and generally pious.—*The Nation, N. Y.*

PURLOINING A JUDGE'S SALARY.—One of the boldest and most remarkable cases of forgery by a boy ever known in Philadelphia has just come to light, and it was no fault of the boy that he did not succeed in getting away with a large sum of money. James Barber, sixteen years old, who lives on the top floor of the Orphan's Court building, is in prison on the charge of larceny and forgery. Detectives Muller and Sharkey on Saturday arrested him in Mount Moriah Cemetery for stealing a warrant for $1,750 belonging to Judge William N. Ashman, and forging the name of the judge and that of City Treasurer Bell in an attempt to have it cashed. The warrant represented the judge's salary for three months, and was delivered by a letter-carrier at the court building on May 26, it having been sent by mail from the auditor-general's office at Harrisburg. The lad either took it from the mail-box or from a table in the judge's room. He then wrote a letter to City Treasurer Bell, saying: "Please give me a check for this warrant, and send by bearer. Yours, W. N. Ashman." Young Barber took the warrant and forged note to Mr. Bell. The warrant was not indorsed, and the lad was told to take it to the judge and have him sign his name on the back. The hopeful forger left, but instead of going to Judge Ashman he stopped at a place in the vicinity, and placed the judicial signature on the back of the paper. He again visited the city treasurer, who, upon carefully scanning the warrant, discovered that the amount was written $1,700 in the body of the warrant, while the figures were $1,750. The lad was again directed to return with the warrant to Judge Ashman, and a letter written by the city treasurer calling attention to the mistake in the warrant was also sent. When a safe place was reached the redoubtable youngster destroyed Mr. Bell's note and composed one of his own. It said: "Please send up your bill. Something's wrong in your account." When the note was delivered to Judge Ashman he was puzzled, and said he would call at the city treasury. When he called there the judge and city treasurer soon learned the true state of affairs. The detectives were immediately employed to catch the thief and forger. Later in the day, seeing that he was baffled, he sent the warrant to Judge Ashman, with a letter signed "Jimmy So-so." When arrested, he made a confession.

THE Irish bull is sometimes introduced into this country with the most gratifying effect. Baron Dowse, of the Irish Exchequer, let loose some famous specimens when he sat in the House of Commons. Replying to a question relating to some sectarian celebrations in Derry, he is reported to have said: "These celebrations, sir, take place at an anniversary which occurs twice a year in Derry." The other evening we encountered an equally well-developed example of the bull. A member of the English Bar, an Irishman well known in society for his many amiable qualities, was discussing a current topic with considerable animation. He was occasionally interrupted by one of the company, and at length becoming irritated, he addressed his friend with much dignity, and said: "You can interrupt me, surr, when I'm done speaking!" —*Pump Court* (Eng).

THE COURT HAD A FELLOW FEELING.—Major Gassaway, a prominent San Antonio lawyer, is famous for his long speeches. They are so long they cause his clients to get long sentences from the exasperated jury.

Recently Major Gassaway defended a murderer, and addressed the jury off and on for the better part of two days. The jury gave the man imprisonment for life in the penitentiary, and they would have given Gassaway twice as much if they could have legally done so.

When Judge Noonan, who was on the bench, asked the doomed man the usual question as to his having objection to sentence being pronounced on him according to law, the latter replied:

"I think, your honor, that the time consumed by my attorney, in addressing the jury, ought to be deducted from my term of imprisonment."

Judge Noonan said that he thought so, too.—*Texas Siftings.*

DOG LAWS.—A dog law is everywhere and at all seasons the occasion of much miscellaneous growling. —Hark to the London Law Journal.

"The dog controversy is raging furiously. One 'leading' journal has opened a 'London Dog-hunt' column to the rabid correspondents on both sides. It is needless to remark that in a controversy conducted as this is likely to be, there will be plenty of bad language and irrelevant matter. But it will do some good if it convinces the Commissioner of Police that the metropolis is not a nigger settlement, and that the warning *surtout point de zele* applies with peculiar force to the administration of the police laws in such an unwieldy overgrown community as London."

"*Nigger* settlement" is *good*! On this side of the water it has been *defendu* for twenty years past to spell the word with two g's.

PLAUSIBLE. — Magistrate: "Well, Patrick, what have you got to say about stealing the pig?"

Patrick: "Well Y'r Honnor-r, ye see, it was jist this: the pig tuk upon him to sleep in my bit of a garden for three noights, y'r Honn'r-r, and I jist sayzed him for the rint!"—*Judy.*